

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

856

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 20820

WALTER MINIARD

Appellant,

v.

JOHN L. LEWIS, JOSEPHINE
ROCHE, AND HENRY G. SCHMIDT
Trustees of the United Mine
Workers of America
Welfare and Retirement Fund of 1950

Appellees

Appeal From the United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

The issues presented are:

1. May the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 (the Fund) deny a pension to a retired miner and former employee of coal operators contributing to the Fund on the basis of the Trustees' unpublished administrative interpretation of one of the Resolutions governing the payment of pensions when the interpretation is contrary to the clear language of the published Resolution?
2. When a union and management delegate to the Trustees of a §302(c)(5) pension fund the authority to establish, by Trustees' Resolution, a part of the trust plan which §302(c)(5) requires to be part of the union-management agreement establishing the Trust, may the Trustees, in exercising this power, impose a condition in the part of the plan established under the delegation which would be unlawful if part of the union-management agreement?
3. Is the provision in the Resolutions of the Trustees of the Fund governing pension eligibility unlawful as unreasonably discriminating among classes of employees when it requires, in addition to the twenty years of employment in the coal industry normally required for pension eligibility, that the individual either have been regularly employed in the coal industry on May 28, 1946, or that he work in the coal industry an additional twenty years subsequent to that date?

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Appeal From the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Plaintiff-Appellant brought this suit pursuant to the provisions of 11 D. C. Code §521 (Supp. IV, 1965), against the Defendants-Appellees who are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 (the Fund). The Fund is a District of Columbia Trust, and the amount in controversy exceeds \$10,000. On Cross Motions for Summary Judgment the District Court entered final judgment in favor of Defendants-

Appellees and the Plaintiff appeals pursuant to 28 U.S.C. §1291 (1964).

STATEMENT OF THE CASE

Plaintiff-Appellant is a retired coal miner and former member of the United Mine Workers of America. The Defendants-Appellees are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 (the Fund). The Fund was established by a section (the Trust Indenture) of the National Bituminous Coal Wage Agreement of 1950 (1950 Agreement). The 1950 Agreement has been amended and reconfirmed since its creation at intervals of one or two years, thus continuing the life of the Fund. The Trust Indenture delegates to the Trustees of the Fund, who are named therein, certain powers including the following:

"Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters."

Pursuant to their authority to establish eligibility requirements, the Trustees on January 27, 1955, adopted Resolution No. 41, governing eligibility requirements for pension benefits, which Resolution was in effect at the time the Plaintiff applied for his pension. (Defendants' Statement of Material Facts, ¶4.)

On August 21, 1959, the Appellant applied to the Fund for a pension. (Defendants' Answer to Plaintiff's Interrogatory No. 1.) On November 3, 1959, the Appellees, Trustees of the Fund, denied the Appellant's application on the ground that he had not been regularly employed in the Bituminous Coal Industry on or about May 29, 1946, as required by Resolution 41. (Defendants' Answer to Plaintiff's Interrogatory No. 3.) The denial of eligibility was based upon Paragraph C, Part 1 of Resolution 41, which provides as follows:

"An applicant shall be eligible for a pension if he has

* * *

C. Retired from or ceased work in the Bituminous Coal Industry after May 28, 1946, following regular employment in a classified job and was regularly employed in a classified job in the Coal Industry immediately preceding May 29, 1946; provided that if he had retired from or ceased working in the Bituminous Coal Industry prior to May 29, 1946, he shall be eligible for a pension only upon the completion of twenty (20) years' service in the Bituminous Coal Industry, and meets the other requirements of eligibility as contained in Paragraphs A and B hereof and its subsections, subsequent to May 28, 1946."

The Trustees have not asserted that the Plaintiff failed to meet the qualifications for a pension as set forth in Sections A and B of Resolution 41. (Plaintiff's Interrogatory No. 3 and Defendants' Answer thereto.) At the time of his application Mr. Miniard was more than sixty years of age, and he had completed twenty years of service in the Coal Industry, as such time is computed, within the thirty years immediately preceding his application for a pension. The only grounds asserted by the Trustees for denying Appellant his pension was that he was not regularly employed in the Bituminous Coal Industry on or about May 29, 1946. (Defendants'

Answer to the Plaintiff's Interrogatory No. 3.)

The Appellant was regularly employed in a classified job^{1/} in the Coal Industry from at least the year 1926 until February, 1943. He was again employed in a classified job in the Coal Industry from March, 1952, until his retirement in 1959. (Plaintiff's Application for a Pension, Exhibit C to Defendants' Motion for Summary Judgment.) From May, 1944, until February, 1952, the Appellant was employed by an insurance company. (Exhibit D to Defendants' Motion for Summary Judgment.)

The Appellant brought suit in the United States District Court, District of Columbia, on November 24, 1965, alleging that the Defendants had wrongfully denied him his pension and asking that he be declared eligible for his pension, that the Trustees be directed to place him on the rolls of individuals eligible to receive pensions and thereafter to pay him his monthly pension, and that he be paid the back monthly pension payments which he had been wrongfully denied. (Plaintiff's Complaint.)

The Appellee Trustees filed a Motion for Summary Judgment in July, 1966, and the Appellant filed a Cross Motion for Summary Judgment in November, 1966. The District Court held a hearing on January 5, 1967, and after oral argument granted the Appellees' Motion for Summary Judgment and denied Appellant's Cross Motion. (Order.) Plaintiff appeals from this decision.

^{1/} A classified job is a job in the bargaining unit to which the 1950 Agreement applies, or would apply, if the mine were a signatory to the Agreement.

STATUTE INVOLVED

The pertinent statutory provision involved is the Labor Management Relations Act, 1947, Section 302(c)(5) [29 U.S.C. §186(c)(5), (1964)].

"(c) The provisions of this section shall not be applicable,

* * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities;"

STATEMENT OF POINTS

1. In a suit against the Trustees of the United Mine Workers of America Welfare and Retirement Fund (the Fund) alleging that the Defendant Trustees wrongfully refused to grant the Plaintiff the pension to which he was entitled, the District Court erred in granting judgment in favor of the Defendants when, on the agreed facts, the Plaintiff met the express requirements as set forth in the plain words of the applicable Trustees' Resolution governing pension eligibility.

2. In granting judgment in favor of the Defendant Trustees, the District Court erred because, if the Trustees' interpretation of the Resolution upon which denial of the Plaintiff's pension application was predicated is correct, the Resolution is unlawful in that it violates the Trustees' duty to potential beneficiaries of the Fund not to discriminate unreasonably among classes of beneficiaries in establishing pension eligibility requirements.

SUMMARY OF ARGUMENT

The Appellant claims eligibility for a pension under the section of Paragraph C of the Trustees' Resolution 41 which provides that individuals not regularly employed in a classified job in the Coal Industry subsequent to May 28, 1946, may receive a pension upon completion of twenty years' employment, and the meeting of the other eligibility requirements, subsequent to May 28, 1946. On the undisputed facts Appellant reached sixty years

of age, completed twenty years of service in the Coal Industry, and met the other requirements as of the date he submitted his pension application in August of 1959. In denying the Appellant his pension the Trustees take the position that, although the proviso to Resolution 41 under which the Appellant claims eligibility speaks only of "completion" of twenty years' classified employment subsequent to May 28, 1946, the intent of the section is to require that all of the twenty years' employment be worked after May 28, 1946; i. e., that such twenty years be "commenced and completed" after May 28, 1946.

Regardless of how much discretion the Trustees of the Fund have in drafting the eligibility requirements, once the requirements are adopted they are binding upon the Trustees until subsequently changed by appropriate process and with formal notice. The express language of the proviso section requires only the "completion" of twenty years' employment subsequent to May 28, 1946. The accepted definitions of "completion," as well as the purposes and the statutory requirements governing the Fund, are consistent with Appellant's interpretation of Paragraph C and do not support the Trustees' interpretation. As the Appellant meets the express requirements of the Resolution, and as the Trustees have never made the twenty years' subsequent employment requirement a part of the formal, published eligibility requirements, they cannot lawfully deny Appellant his pension.

Assuming that the Trustees' interpretation of the proviso in Paragraph C of Resolution 41 is correct, Paragraph C is unlawful. The Trustees, in drafting the requirements for pension eligibility, owe the

employee beneficiaries of the Trust a duty which is substantially the same as a union's duty of fair representation owed to the members of its bargaining unit. Under this duty, the eligibility requirements which the Trustees adopt must meet two standards:

(1) Distinctions which the Trustees impose between classes of employees must be relevant to the purposes of the Fund and the terms and conditions of the employees' employment, and

(2) When different classes of employees are created based upon relevant differences, the discrimination in the treatment of the classes must not be so gross as to be unreasonable.

Paragraph C of Resolution 41, as interpreted by the Trustees, imposes a difference of up to twenty years in the amount of classified coal employment required for eligibility, depending upon whether or not an individual was regularly employed in a classified job in the Coal Industry on a given date. This distinction between classes of employees is not relevant to any of the purposes of the Fund or terms and conditions of coal mine employment. Assuming, arguendo, that the distinction is relevant, the discrimination imposed is so gross as to be capricious, arbitrary and unreasonable. Consequently, Paragraph C of Resolution 41 is unlawful and may not be used as a basis for denying Appellant his pension.

ARGUMENT

- I. IN A SUIT AGAINST THE TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND (THE FUND) ALLEGING THAT THE DEFENDANT TRUSTEES WRONGFULLY REFUSED TO GRANT THE PLAINTIFF THE PENSION TO WHICH HE WAS ENTITLED, THE DISTRICT COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE DEFENDANTS WHEN, ON THE AGREED FACTS, THE PLAINTIFF MET THE EXPRESS REQUIREMENTS AS SET FORTH IN THE PLAIN WORDS OF THE APPLICABLE TRUSTEES' RESOLUTION GOVERNING PENSION ELIGIBILITY.

The Fund of which the Appellees are Trustees is a Trust established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, 61 Stat. 157 (1947), 73 Stat. 537 (1959), 29 U.S.C. §186(c)(5) (1964 ed.). In acting on a pension application the Trustees of such a Trust are bound by the regulations governing eligibility for pensions which they have established, regardless of how much discretion they are given in establishing these requirements. Danti v. Lewis, 114 U.S. App. D.C. 105, 312 F.2d 345 (1962). In the present case the Trustees have done precisely what this Court in Danti said they could not do, that is, depart from their own established regulations in determining Appellant's eligibility for a pension.

Appellant Walter Miniard's application for a pension was denied by the Appellee Trustees ^{2/} of the Fund solely on the grounds that Miniard did not meet the requirement of Paragraph C, Part I, of the Trustees'

^{2/} Hereinafter referred to as Trustees.

Resolution 41 that he be regularly employed in a classified job in the Coal Industry on May 29, 1946. The Appellant admits that he was not so employed but claims eligibility for a pension under the further provision of Paragraph C which states:

"provided that if he [the applicant] had retired from or ceased working in the Bituminous Coal Industry prior to May 29, 1946, he shall be eligible for a pension only upon completion of twenty (20) years' service in the Bituminous Coal Industry, and meets the other requirements of eligibility as contained in Paragraphs A and B hereof and its subsections, subsequent to May 28, 1946."

Subsequent to May 28, 1946, Plaintiff returned to work in the Coal Industry and fulfilled the eligibility requirements of Paragraphs A and B, including completion of his twenty years' service.

The Trustees take the position that the proviso does not apply to Miniard because they interpret it as requiring that individuals not regularly employed in the Coal Industry on or about May 29, 1946, must work an additional twenty years subsequent to the May 28, 1946, cutoff date, without regard to any classified Coal Industry employment prior to that date, in order to qualify for a pension. To the best of Appellant's knowledge the Trustees never publicly published this interpretation of the proviso.

The proviso to Paragraph C clearly states that individuals who had ceased work in the Coal Industry prior to May 28, 1946, would qualify for a pension only "upon completion" of their twenty years required service subsequent to the May 28th cutoff date. The rule speaks only of completing service subsequent to a given date. Nowhere does it state that the individual

must work the entire twenty years subsequent to May 28, 1946. As Appellant "completed" his required twenty years' service in the Coal Industry subsequent to May 28, 1946, to wit, in February, 1959, he comes within the express language of the proviso.

The dictionary definition of the noun "completion" shows quite clearly that the rule does not have the meaning which the Trustees would impart to it. Webster's New International Dictionary (3rd ed., 1961) defines "completion" as "The act or action of completing, becoming complete, or making complete (his completion of the late artist's unfinished masterpiece); * * * 2. the quality or state of being complete: fulfillment." Black, Law Dictionary (4th ed., 1957), gives as the meaning, "The finishing or accomplishing in full of something theretofore begun; substantial performance of what one has agreed to do; state in which no essential element is lacking." Under these definitions the requirement for completion of twenty years' service subsequent to a given date can mean only that the period must end after that date, not that it must be performed in its entirety after that time.

Appellant's definition is fully compatible with the objectives of the Fund and the requirements imposed by Section 302(c)(5) as to who may be beneficiaries of the Fund. The objective of this Fund is to provide benefits "to the employees of said [signatory] operators." (Trust Indenture, §5.) The language of the Indenture clearly indicates an intent to benefit all, or as many as may be qualified, of the present and/or future employees of the signatory operators. See Rittenberry v. Lewis, 239 F.Supp. 506

(E.D. Tenn., 1965). Nowhere in the Trust Indenture is there any statement or indication that the benefited employees were only those who were working for the signatory operators some four years before the establishment of the Fund. The Appellant's interpretation of Paragraph C, by requiring only the "completion" of the required twenty years of employment to be subsequent to May 28, 1946, is fully compatible with this objective. The Trustees' interpretation, by making pension qualification virtually impossible for individuals such as the Appellant who would be too old to work long before he worked the twenty additional years, would not be at all consonant with that objective.

The Appellant's interpretation is compatible with and reasonable in view of the statutory requirements regarding beneficiary eligibility which a Section 302(c)(5) trust must meet. Under the first part of Paragraph C, an individual who was an employee of a signatory operator at the time the original Fund was established, May 29, 1946, may retire at any time upon his meeting the other eligibility requirements.^{3/} However, individuals who

^{3/} Resolution 41 does not specifically require that an individual have been an employee of a signatory operator on or after May 28, 1946, in order to qualify for a pension. In other cases involving suits for a pension, however, the Trustees appear to have taken the position that at some time the individual must have been an employee of a signatory operator making contributions to the Fund. See, e.g., Rittenberry v. Lewis, 238 F.Supp. 506 (E.D. Tenn., 1965) and Bolgar v. Lewis, 238 F. Supp. 595 (W.D. Pa., 1960). The

had retired from or ceased working in the Coal Industry before the original Fund was established are not "employees" within the meaning of Section 302(c)(5). Blassie v. Kroger, 345 F2d 58 (8th Cir. 1965.) Only individuals who have worked for an employer during the period the employer was making contributions to the Fund may receive benefits from it. Thus the individual who had ceased work before the first Fund was established would have to return to work for a signatory employer so as to complete the twenty years of coal mine employment required for pension eligibility subsequent to the May 28, 1946, date.

The Trustees' interpretation, by comparison, does not require merely the subsequent employment by a signatory operator contributing to the Fund required by statute, but twenty years of employment after the May 28, 1946, cutoff date. There is nothing in Section 302(c)(5) which requires or justifies imposing this nearly impossible burden for qualifying for a pension on individuals such as the Appellant.

Appellant contends that the meaning of the word "completion" as used in the proviso to Paragraph C is clear and is contrary to the

Trustees' position in these cases appears to be in accord with Section 302 (c)(5) and with the decided cases. Blassie v. Kroger, 345 F2d 58 (8th Cir., 1965) and Garvison v. Jensen, 355 F2d 487 (9th Cir., 1966). Inasmuch as most of Appellant Miniard's employment subsequent to his return to work in the Coal Industry in 1952 was with signatory mines, the problem of non-signatory employment is not present in this case.

interpretations which the Trustees have adopted in this case. To the extent that there is any ambiguity in the meaning of the Resolution, however, it is a well established principle of trust law that the ambiguity is to be resolved in favor of the beneficiaries. See, e.g., In Re Millers Trust, 397 P2d 443 (Haw. 1964), St. Louis Trust Company v. Clark, 352 Mo. 518, 178 S.W. 2d 359, 365 (1944), Title Ins. Trust Co. v. Duffell, 191 Cal. 629, 218 Pac. 14 (1923).

Inasmuch as the interpretation of the proviso of Paragraph C urged by the Appellant is entirely consistent with the express language of the proviso, with the objectives of the Fund, and with the statutory requirements which the eligibility requirements must meet, and inasmuch as any ambiguity in the meaning of the Resolution, if there is any, is to be resolved in favor of the Appellant beneficiary, the Appellant's interpretation of the proviso should prevail. Under this reading of the Resolution the Trustees' denial of Appellant Miniard's application for a pension was improper and judgment should have been entered in favor of the Appellant by the District Court. Accordingly, the District Court's judgment should be reversed.

II. IN GRANTING JUDGMENT IN FAVOR OF THE DEFENDANT TRUSTEES, THE DISTRICT COURT ERRED BECAUSE, IF THE TRUSTEES' INTERPRETATION OF THE RESOLUTION UPON WHICH DENIAL OF THE PLAINTIFF'S PENSION APPLICATION WAS PREDICATED IS CORRECT, THE RESOLUTION IS UNLAWFUL IN THAT IT VIOLATES THE TRUSTEES' DUTY TO POTENTIAL BENEFICIARIES OF THE FUND NOT TO DISCRIMINATE UNREASONABLY AMONG CLASSES OF BENEFICIARIES IN ESTABLISHING PENSION ELIGIBILITY REQUIREMENTS.

A. The Appellee Trustees in Performing the Duty of Establishing the Requirements for Pension Eligibility Which Was Delegated to Them by Employers and Union Under the Provisions of a Collective Bargaining Contract Are Under a Duty to Protect Fairly the Interests of All of the Potential Beneficiaries.

When establishing eligibility requirements for obtaining a pension the Trustees of a Section 302(c)(5) trust are performing a function which, by statute, is entrusted to negotiations between the employer and the union. Section 302(c)(5)(B) specifically provides that, in order for the employer to be able lawfully to make contributions to the trust "the detailed basis on which such [benefit] payments are to be made is [to be] specified in a written agreement with the employer."

If the eligibility requirements for a pension were contained in the employer-employee agreement itself, as part of the Trust Indenture, the union, in negotiating the requirements, would be under its duty to represent fairly the interests of all of the employees for whom it is the statutory bargaining representative. Wallace Corp. v. Labor Board, 323 U.S. 248, 255 (1944); Vaca v. Sipes, 386 U.S. _____, 17L.Ed.2d 842 (1967). Under this

duty, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 17 L.Ed.2d at 850. Not only does the union owe this duty to the members of the bargaining unit, but management may not lawfully acquiesce to a union's violation of this duty. Wallace Corp. v. Labor Board, supra; Steele v. Louisville & N.R.R., 323 U.S. 192, 203-204 (1944).

The Signatory Operators' and United Mine Workers of America's delegation to the Trustees of the duty of establishing the basis upon which pensions will be paid, i. e., the eligibility requirements, has been expressly held to be lawful by several District Courts. See, e.g., Ramsey v. UMWA Welfare and Retirement Fund, 237 F.Supp. 909 (E.D. Tenn., 1965); and Van Horn v. Lewis, 79 F.Supp. 541 (D.D.C. 1948). Such a delegation has received at least implied sanction from the Supreme Court and several Courts of Appeal in decisions holding that this Fund and other trusts having similar delegations are lawful under Section 302(c)(5). See, e.g., Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960); Blassie v. Kroger, supra; and Garvison v. Jensen, supra. Accordingly, Appellant does not question the lawfulness of this delegation of the power to draft eligibility requirements.

Appellant does contend, however, that the Union's and Signatory Operators' delegation to the Trustees of the duty of drafting the eligibility

requirements does not give the Trustees the power to impose a requirement which the Union and Signatory Operators could not agree upon, such as when the requirement would unlawfully discriminate among employees or classes of employees which the union represents. Stated another way, Appellant contends that the eligibility requirements drafted by the Trustees must meet the same standard which they would have to meet if they were drafted by the union and management. Appellant urges four reasons for holding the Trustees to this standard of conduct in exercising this delegated authority.

First: The Trustees, in establishing the criteria for the payment of benefits, are performing a function which was of special concern to Congress in enacting Section 302(c)(5). See Arroyo v. United States, 359 U.S. 419, 426 (1959). H.R. Rep. No. 10, 80th Cong., 1st Sess. (1947). When the union negotiates these requirements, the beneficiaries are ensured that their interests will be protected against arbitrary or discriminatory provisions being written into the agreement. The beneficiaries should not be deprived of this protection by the device of the Union and Signatory Operators' delegating the function of drafting the eligibility requirements to a group of individuals, i. e., the Trustees, who owe the beneficiaries a lesser duty.

Second: Pension plans and the rights of employees thereunder are a part of an employee's "wages and conditions of employment," Inland Steel Co. v. NLRB, 170 F2d 247 (7th Cir., 1948), cert. denied, 336 U.S. 960 (1949). The benefits paid through the Fund to the employees of the

contributory operators are a form of compensation paid to the employees. Lewis v. Benedict Coal Corp., 361 U.S. 459, 469 (1960). In establishing criteria for the eligibility of beneficiaries the Trustees are performing the same function as the union and management perform in negotiating pursuant to the requirements of the National Labor Relations Act over these benefits. Consequently, the Trustees should be held to at least the same standard in judging their conduct.

Third: Whether the Trustees be regarded as agents of the Union and Management, or as Independent Trustees, their common law duty towards the employee beneficiaries is the same or higher than the standard of conduct imposed upon the Union. If the Trustees of a Section 302(c)(5) trust are agents, as they were held to be by the Second Circuit in Local 138, I.U. of Operating Eng'r. v. NLRB, 321 F2d 130, 137 (1963), they are under the same statutory obligations as the union in matters where they act for the union and management as they do here. Local 138 I.U. of Operating Eng'r. v. NLRB, supra. If, on the other hand, the Appellees are Independent Trustees, then their duty of loyalty is to, and they operate the Trust solely for the benefit of, the beneficiaries. Restatement (Second), Trusts §170 (1959), 2 Scott, Trusts, 1192 (2ed., 1956). Where, as here, there are multiple beneficiaries, they have a duty to deal fairly with all of the beneficiaries. Restatement (Second), Trusts §183 (1959), 2 Scott, Trusts, 1354 (2ed. 1956).

Fourth: In delegating the duty of establishing the eligibility requirements, the union and management cannot give the Trustees the right to deal

with the beneficiaries in a way that they themselves could not do. To give the Trustees the power to deal less than fairly with the beneficiaries would itself be a violation of the union's duty to protect the interests of all the members of the bargaining unit, and management could not agree to it. As the union's duty of fair representation is statutory, Steele v. Louisville & N.R.R., supra, and as the Trust instrument specifically states that the Trustees' discretion is subject to the limitations of applicable law (Trust Indenture, §5), the grant of discretion given the Trustees must be read to include the limitation that in establishing the eligibility requirements the Trustees cannot impose any requirement for which the union, because of its duty to the members of the bargaining unit, could not bargain.

B. The Portion of Paragraph C of Resolution 41, As Interpreted by the Trustees, Under Which the Appellant Was Denied His Pension Violates the Trustees' Duty Not to Discriminate Unreasonably Among Potential Beneficiaries of the Trust.

As set forth above, the Fund's Trustees owe the same duty not to discriminate among the beneficiaries of the Fund as a union owes to the employees it represents. The classic statement of this duty as it limits the union's right to discriminate among members of the bargaining unit in its negotiations with management is found in Chief Justice Hughes' opinion in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944):

"This [the duty not to discriminate] does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on

some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. [Citations omitted.] Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions, does not include the authority to make among members of the craft discriminations not based on such relevant differences." (323 U.S. at 203.)

Appellant does not contend that the conditions laid down by Chief Justice Hughes with respect to discrimination by the union deny the Trustees any discretion in drawing the requirements governing eligibility for a pension. Appellant does contend, however, that in applying the language of the Steele decision to the pension situation, the discretion of the Trustees in drawing eligibility requirements is limited by two standards:

1. The distinctions which the Trustees draw between individuals who are eligible and who will not be eligible must be relevant to the purposes of the Fund and/or the terms and conditions of employment of the potential beneficiaries; and

2. The distinctions which are drawn, where distinctions may validly be drawn, should not be so gross as to be capricious, arbitrary, and unreasonable.

Appellant contends that Paragraph C, as interpreted by the Trustees,

and as apparently interpreted by the District Court, does not meet either of these two requirements and is thus unlawful on both counts.

The Purposes of the Fund and/or Terms and Conditions of
Employment in Signatory Mines.

Paragraph C, as interpreted by the Trustees, places great emphasis on the individual miner's employment on May 29, 1946. It says that any individual regularly employed in a classified job in the Coal Industry on that date may retire at any time, upon meeting the other eligibility requirements. Any individual who was not regularly employed in a classified job in the Coal Industry on that day and who wishes to draw a pension may not stop working before May 28, 1966, twenty years later, regardless of his age and total years of service in the coal mines for signatory employers or otherwise. Even then, the individual, including the Appellant, may retire and draw his pension only if he has regularly worked in the Coal Industry for all of the twenty years subsequent to May 28, 1946. Appellant, Walter Miniard, must work regularly until 1972, when he would be 73 years old, to qualify for a pension, whereas other miners, with the same other qualifications as the Appellant, and who may have worked exactly the same number of days for signatory mines subsequent to May 28, 1946, may retire at the age of 60.

This distinction cannot be justified in the purposes of the Fund. The Fund is established for the purpose of paying benefits "to the employees of said [signatory] operators." The Agreement was signed in 1950 and has

been continued in effect by subsequent amendments. Nowhere in the 1950 Agreement or the amendments thereto does the Trust Indenture state that the Fund is for the purpose of paying retirement benefits only to the individuals who were working in the coal mines, signatory or non-signatory, on May 29, 1946.

The date May 28, 1946, does not represent the date that the Fund was established. This Court has specifically stated that the May 28 date could not serve as a cutoff date on that basis. Danti v. Lewis, 114 U.S. App. D. C. 105, 110, n. 5, 312 F2d 345, 350, n. 5 (1962).

The date May 28, 1946, does not have any relation to the accumulation of trust funds out of which pension benefits were to be paid. As indicated in the Trust Indenture, the Fund is financed out of contributions paid by employers subsequent to the date of creation of the Fund, March 5, 1950, on coal mined after that date.^{4/} An individual such as the Appellant who has worked for more than five years after May 28, 1946, mining coal on which royalties were paid to the Fund has done far more

^{4/} The Trust Indenture provides that the Fund would take the assets and obligations of the predecessor 1947 Fund. The 1947 Fund was a successor to the 1946 Fund. Both these Funds, however, were financed entirely out of contributions paid subsequent to the date of the establishment of the original Fund, May 28, 1946. See History of the UMWA Welfare and Retirement Fund, Final Report of the Subcommittee on Welfare and Pension Funds, Senate Committee on Labor and Public Welfare, pp. 167-170, 84th Congress, 1st Sess. (1955).

work to insure the economic viability of the Fund than the individual who was merely an employee of a signatory operator on that date. The discrimination built upon the May 29, 1946, date cannot be justified on the basis of the needs for financing the Fund.

The date May 29, 1946, is relevant to the operation of this Fund only in that it marks the date when signatory operators began making contributions to the predecessors of the present Fund. In order for this Fund to be able to pay a pension to an individual, he must have been an employee of a signatory operator making contributions to this Fund, Blassie v. Kroger, supra, or, presumably, an employee of an operator making payments to a predecessor Fund. But this relevancy of the date would only justify the Trustees' requiring regular employment with the signatory operator on or after May 29, 1946. The distinction which the Fund draws turns upon whether or not the individual was working for any mine, signatory or non-signatory, on that date, and requires twenty years' additional work in the coal mines, signatory or non-signatory, of those individuals not working on that date. Although May 29, 1946, may be relevant to a distinction the Trustees might draw, it is not relevant to the distinction the Trustees have drawn in Paragraph C of Resolution 41.

The Discrimination Based Upon the Distinction is Unreasonable.

Assuming, arguendo, that employment on May 29, 1946, justifies some discrimination against the miners not employed in classified jobs on May 29, 1946, the twenty years of additional work which the Rule requires

is, in at least three respects, totally out of proportion to any relevance the May 29, 1946, date may have.

First, the twenty years of employment in the Coal Industry required after May 28, 1946, is as much employment as is the total classified Coal Industry employment required by the Fund for qualification for a pension. For individuals who had twenty years¹ employment prior to that date, the Fund has as much as doubled the required work for pension eligibility. This is a grossly excessive penalty for not being employed in the Coal Industry on that date.

Second, assuming that most people cannot engage in the heavy work involved in mining after the age of 65 or so, or even obtain such work if their health permits, the Rule effectively forecloses the possibility of obtaining a pension for anyone over the age of 45 as of the 1946 date, regardless of his total service in the coal mines. In effect, the individual may work for as many as ten or fifteen years for a signatory operator without the reasonable prospect of a pension because, as in the case of the Appellant, he was not employed as of the magic date.

Third, the Rule discriminates against the miner with the greatest total employment in the Coal Industry. A younger man, who in view of his age would probably have had less service before 1946, has a reasonably good chance of obtaining the twenty years of employment required subsequent to 1946. The older man, with many years of employment before 1946, such as the Appellant, finds it virtually impossible to meet the qualification. In effect, the older man with the most past employment, whom the Fund

presumably was designed to benefit, is hurt the worst.

Nor can the Trustees justify such discrimination on the grounds that they are limited by the number of pensions which they can pay, and that they therefore must exclude some individuals who would otherwise be qualified. The employers' contributions to the Fund are a form of compensation to the individuals who mine the coal. Lewis v. Benedict Coal Corp., supra. A union, in its negotiations with management, could not enter into an agreement whereby only half of the workers would be paid, with the others to work without pay, and justify the discrimination on the grounds that the employer could only afford to pay to half of the employees what the union thought was a proper wage, or on any other basis. The cutting off of the wages of some employees who are doing the same work for the same company as those who are being paid would be an obvious and gross discrimination against the employees whose wages are cut off. The same principle is no less true of any attempt by the Trustees to do the same thing under the guise of devising pension eligibility requirements -- and it is precisely the situation which confronts the Court here.

Inasmuch as Resolution 41 clearly violates the Trustees' duty not to discriminate unreasonably among potential beneficiaries of the Trust, it is unlawful and cannot be used as a basis for denying the Appellant his pension.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests this Court to reverse the judgment of the District Court, and to direct that judgment be entered in favor of the Plaintiff Appellant on his complaint.

Respectfully submitted,

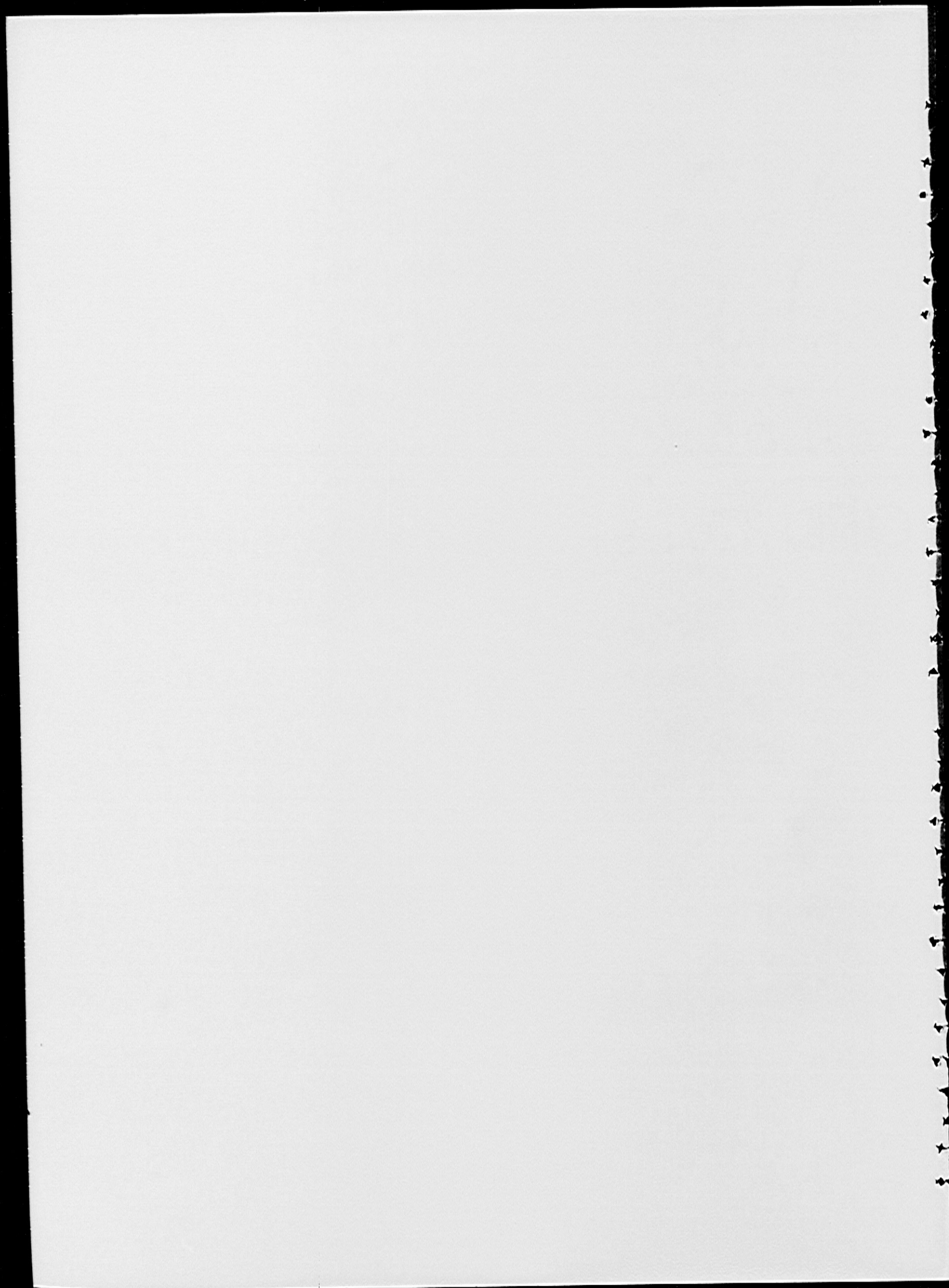
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April 17, 1966



CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed,
postage prepaid, this 17th day of April, 1967, to Harold H. Bacon,
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20005.

BRIEF FOR APPELLEES AND JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20820

WALTER MINIARD, *Appellant*

v.

**JOHN L. LEWIS, JOSEPHINE ROCHE AND HENRY G. SCHMIDT,
TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE
AND RETIREMENT FUND OF 1950, *Appellees***

**Appeal from the United States District Court for the
District of Columbia**

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 7 1967

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of Appellees, the questions are:

1. Did the District Court err in granting Appellees' motion for summary judgment and denying Appellant's cross-motion for summary judgment, when, on the uncontested facts before the District Court, Appellant clearly failed to meet the Trustees' eligibility requirements for Trust Fund pension benefits.

2. May the Appellant raise issues for the first time in this Court, which were not raised before, or considered by, the District Court, and urge on the basis of those issues that the District Court's order of judgment in favor of Appellees be reversed.

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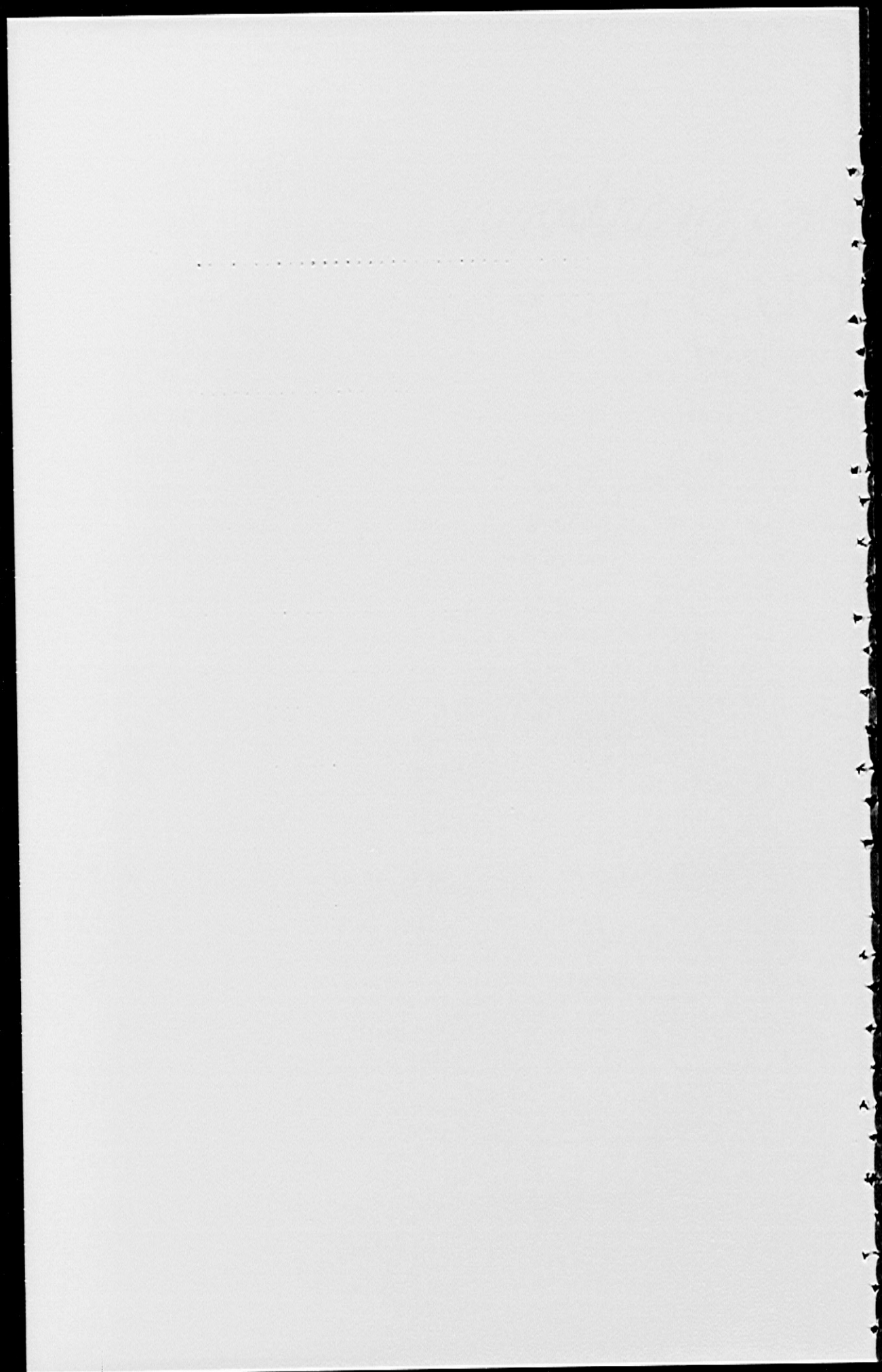
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20820

WALTER MINIARD, *Appellant*

v.

JOHN L. LEWIS, JOSEPHINE ROCHE AND HENRY G. SCHMIDT,
TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE
AND RETIREMENT FUND OF 1950, *Appellees*

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

There is no dispute as to the material facts or issues involved *as presented by both parties in the District Court.*¹ These facts and issues may be summarized briefly as follows:

1. Appellant-Miniard filed an application for pension benefits with the Fund² (J.A. pp. 19-21) on August 13, 1959.

¹ The additional facts and issues raised by Appellant-Miniard's brief, particularly in Argument II, were not presented below.

² The United Mine Workers of America Welfare and Retirement Fund of 1950, which Appellees serve as Trustees, was created by a Trust Indenture contained in the National Bituminous Coal Wage Agreement of 1950 (J.A. pp. 10-15).

On the face of the application Miniard did not claim employment in the bituminous coal industry from May, 1943 to April, 1952, and in reply to the Fund's inquiry affirmed his employment as a collection agent for an insurance company during this period (J.A. pp. 23-24). Miniard returned to employment in the coal industry in April, 1952, worked in a classified job for three employers some six years and three months, until February, 1959 (J.A. p. 20).

2. At the time Miniard's application for pension benefits was received by the Fund the eligibility requirements for pension benefits was controlled by Resolution 41 (J.A. pp. 16-17), which had been adopted by the Appellee-Trustees January 27, 1955. Miniard qualified for pension benefits under this Resolution in all respects except he did not meet the requirements of paragraph I. C., which is as follows:

Retired from or ceased work in the Bituminous Coal Industry after May 28, 1946, following regular employment in a classified job and was regularly employed in a classified job in the Coal Industry immediately preceding May 29, 1946; provided that if he had retired from or ceased working in the Bituminous Coal Industry prior to May 29, 1946, he shall be eligible for a pension only upon the completion of twenty (20) years' service in the Bituminous Coal Industry, and meets the other requirements of eligibility as contained in Paragraphs A and B hereof and its subsections, subsequent to May 28, 1946. (Emphasis supplied)

3. Miniard was notified on November 3, 1959 that his application for pension was denied. The notice of denial contained the following information (J.A. p. 25):

Plaintiff had not established proof of regular employment in the Coal Industry immediately prior to May 29, 1946. According to evidence in the Trust Fund files Plaintiff was not employed in the coal industry from May 13, 1943 to April 29, 1952 and was, in fact, employed outside the coal industry during this period. Therefore, Plaintiff has not established that he meets the requirement set forth above.

4. Initially in the District Court, the Appellant-Miniard, urged he had complied with the eligibility requirements for pension benefits, including the requirement "that he was regularly employed in a classified job in the coal industry immediately prior to the date the first fund was established" (Complaint par. 4, J.A. p. 2). Appellee-Trustees filed their motion for summary judgment, July 26, 1966 (J.A. pp. 5-7), setting out the uncontrovertible fact that Miniard had not been employed in the bituminous coal industry for the period "May, 1943 until February or April, 1952" but had been employed as "an insurance company salesman". Miniard then raised, by cross-motion for summary judgment (J.A. p. 25), the issue now contested, that inasmuch as he had returned to the coal industry and had been employed for some six (6) years, which when added to his employment prior to 1943, gave him a total of twenty (20) years' service, Trustees "arbitrarily and capriciously" denied his pension application.

5. Neither below, except for the allegations of the Complaint, nor now in this Court (Br. p. 10), does Miniard contend he was employed in the "Coal Industry, immediately preceding May 29, 1946" as required by Trustee Resolution 41, paragraph I. C. (J.A. p. 16).

6. The District Court, by its order of January 9, 1966 (J.A. p. 28), granted Appellee-Trustees' motion for summary judgment, and denied Appellant-Miniard's cross-motion for summary judgment. The District Court's order was based upon, and limited to, the facts and issues raised by the pleadings, interrogatories and affidavits, which are the record on appeal here (J.A. p. 1, *et seq.*). The additional issues raised by Appellant-Miniard's brief in this Court, were not before, or considered by, the District Court.

From the District Court's order and judgment of January 9, 1966, Appellant-Miniard noted this appeal.

SUMMARY OF ARGUMENT

Appellant-Miniard urges reversal of the District Court's judgment order granting Appellee-Trustees' motion for summary judgment and denying Miniard's cross-motion for summary judgment.

The facts in the District Court were not in dispute. Miniard's application for pension benefits of the Fund was denied by Appellee-Trustees, under the provisions of Trustee Resolution 41, paragraph I. C. This Resolution required an applicant for pension benefits must have been regularly employed in the bituminous coal industry "immediately preceding May 29, 1946", provided if he was not so employed and thereafter returned to employment in the coal industry, he was eligible for pension benefits "only upon the completion of twenty (20) years' service * * * subsequent to May 28, 1946". Miniard was employed as an insurance agent from 1943 until 1952 when he returned to the coal industry in 1952 and was so employed until 1958. This last 6 years of industry service, when added to some 14 years' service prior to 1943, total 20 years' service. Miniard contends, based on these facts, Trustees arbitrarily and capriciously denied his pension application by failing to follow the language of their own eligibility resolutions.

Miniard relies on the dictionary definition of the word "completion", in the phrase "upon the completion of twenty (20) years' service", urging that if an applicant returns to employment after May 28, 1946, he satisfies the "upon completion" requirement, when his overall employment finally totals 20 years. The word "completion" cannot be isolated, taken out of context of the words forming the obvious intent of paragraph I. C. To accept the bare dictionary definition of this phrase would deny all meaning and reason for the requirement that an applicant must have been regularly employed in the coal industry "immediately preceding May 29, 1946". An applicant could return to

industry employment "subsequent to May 28, 1946" and serve long enough that his employment, before and after May 28, 1946, would total 20 years' service, and thereby qualify for pension benefits. Trustees' purpose in adopting this eligibility requirement, to protect the financial integrity of the Fund, would be totally frustrated. Those employees who had, for one reason or another, terminated their coal industry connection before the Fund was created could return, serve briefly, and receive a Fund pension. A rapid depletion of the trust res resulted from this set of facts, and required this restrictive requirement if the fiduciary obligation of the Trustees was to be served.

The authority granted Trustees to formulate eligibility requirements for Fund benefits has been recognized by this Court, and this Court has commanded that the Trustees must preserve the trust res for potential beneficiaries. Congress has been cognizant of the adoption of this eligibility requirement, and the Trustees' purpose therefore, for over 10 years without adverse comment or corrective legislation. The denial of Miniard's pension application was required by Trustee intent and purpose, reflected by the unambiguous language of Resolution 41, and the District Court, granting Trustees' motion for summary judgment, correctly denied Miniard's contention Trustee action was arbitrary and capricious.

Miniard raises several issues in this Court for the first time, that were not presented to, or considered by, the District Court, to wit: (1) Trustees violated their fiduciary duty by failing to formally publish their interpretation of paragraph I. C., Resolution 41, requiring that an applicant unemployed "immediately preceding May 29, 1946", return to work in the coal industry "subsequent to May 28, 1946" and be so employed a full 20 years after that date, (2) that the Union's duty under the Act of fair representation of all employees is superimposed on the Trustees who violated their fiduciary obligation of fairly representing the interests of all potential beneficiaries, and (3) that the

Trustees violated their fiduciary duty by discriminating between classes of potential beneficiaries, namely, those employed in the coal industry immediately preceding and subsequent to May 29, 1946. The District Court cannot be held to have committed error in failing to rule on these issues, not raised below, but even if properly raised, they are without merit, without basis in law or fact, precluding consideration then or now.

ARGUMENT I

ON THE UNCONTESTED EVIDENCE BEFORE THE DISTRICT COURT, THAT COURT PROPERLY HELD APPELLANT DID NOT MEET THE PENSION ELIGIBILITY REQUIREMENTS OF THE FUND, AND THAT TRUSTEES' PENSION DENIAL WAS NOT ARBITRARY, CAPRICIOUS OR IN BAD FAITH.

The issues here are limited to determining (1) whether the District Court, by its order of January 9, 1966 (J.A. p. 28), erred in its obvious conclusion that Trustees had not acted arbitrarily, capriciously or in bad faith in denying Miniard's pension application on the ground he was not employed in the coal industry "immediately preceding May 29, 1946", and in reply to the issue raised by the cross-motion for summary judgment, (2) whether Miniard was employed for the required period of twenty (20) years after May 28, 1946, both required by Resolution 41 (J.A. p. 16). Stated differently, can Trustees be charged with arbitrary and capricious action, for denying pension benefits to an applicant not employed "immediately preceding May 29, 1946", and who returned to employment in the coal industry after that date, but did not work long enough to establish the required twenty (20) years' service in the industry after May 28, 1946?

Miniard seeks to come within this Court's opinion in *Danti v. Lewis*, (C.A. D.C., 1962) 114 U.S. App. D.C. 105, 312 F. 2d 345, wherein it was held "The Trustees violated their own Resolution * * *" in denying Danti's application when the evidence was sufficient "to establish

eligibility under their own standards at the time it was received" (p. 349). Miniard contends he falls within Resolution 41's paragraph I. C. provision, which permits eligibility for pension benefits for those not "regularly employed" in the coal industry "immediately preceding May 29, 1946, * * * upon the completion of twenty (20) years' service" in the coal industry "subsequent to May 28, 1946". Further, that since he was employed from 1952 to 1958, he completed the twenty (20) years' service "subsequent to May 28, 1946", when that 6 years is added to the some 14 years of service accumulated prior to May 29, 1946. Thus, Trustees violated the terms and provisions of their own Resolution in denying his pension application.

The main thrust of Miniard's argument here is centered on the dictionary definition of the word "completion" contained in paragraph I. C., Resolution 41 (Appellant's Br. p. 11). Resolution 41's paragraph I. C. (J.A. p. 16), provides that an applicant for pension benefits must have been employed in the bituminous coal industry "immediately preceding May 29, 1946," but that if the applicant "had retired or ceased working" in the industry "prior to May 29, 1946" he could qualify "only upon the completion of twenty (20) years' " industry service "subsequent to May 28, 1946". Miniard contends the Resolution's phrase "upon completion" must be interpreted to permit a miner, who had "retired or ceased" industry employment "prior to May 29, 1946" and was not employed in the industry "immediately preceding May 29, 1946", to return to the industry "subsequent to May 28, 1946" and be employed for a sufficient period to accumulate a total of twenty years' service. This would be true, to follow Miniard's theory, whether the additional service needed was a fraction of a year or the some six years as here.

Trustees do not contest these dictionary definitions standing alone; out of context in the frame of reference in which the word was used. However, a word cannot stand alone, isolated from the context in which it is used. A

word is defined in Webster's New Collegiate Dictionary (1961 Ed.), as "an articulate sound or series of sounds which symbolizes and communicates an idea; the smallest unit of speech that has meaning when taken by itself". Obviously when not "taken by itself", but in context with other words, the pure meaning may be colored, modified or even altered, from the meaning when viewed alone. This is the situation here. A reading of Resolution 41's paragraph I. C., in the full context, would render the requirement of "regular employment" in the coal industry "immediately preceding May 29, 1946" completely without meaning or reason, if Miniard's interpretation is adopted. In context, the word "completion" can have no other connotation, but that the service obligation for those who were not employed in the coal industry "immediately preceding May 29, 1946" could only be fulfilled by the performance of a full 20 years' service "subsequent to May 28, 1946".

Mr. Justice Holmes in *Towne v. Eisner* (1918), 245 U.S. 418, 62 L. ed 372, cogently puts to rest Miniard's reliance on the dictionary definition of the word "completion". In discussing the different meanings of the word "income" as applied to the Constitution and an Act of Congress, Mr. Justice Holmes said (p. 425):

But it is not necessarily true that income means the same thing in the Constitution and the act. *A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.* *Lamar v. United States*, 240 U.S. 60, 65, 60 L. ed. 526, 528, 36 Sup. Ct. Rep. 255. (Emphasis supplied)

In *Powell v. Lewis*, (D.C. W.D. Pa.), 42 Labor Cases (CCH) Par. 16,866, the court stated the reason and the reasonableness of paragraph I. C., Resolution 41, and sustained the interpretation of that Resolution by the Trustees. The court said (p. 24,202):

The Trustees, by the Trust Instrument contained in the National Bituminous Coal Wage Agreement of

1950, were given full and complete authority with respect to questions of coverage and eligibility, subject to the stated purposes of the Fund and within the terms and provisions of the Labor-Management Relations Act, 1947. *The requirement of regular employment in a classified job in the coal industry immediately prior to May 29, 1946 is a reasonable one as that was the date the first trust came into existence, and the adoption of such requirement of eligibility is within the powers conveyed to the Trustees by the settlors.*

The finding of the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 that Plaintiff was not regularly employed in a classified job in the coal industry immediately prior to May 29, 1946 is supported by substantial evidence and the denial of Plaintiff's application for pension was proper. (Emphasis supplied)

A case on all fours is *Pavlovscak v. Lewis*, (D.C. W.D. Pa., 1960) 190 F. Supp. 205, aff'd per curiam (C.A. 3) 295 F. 2d 39. There the applicant, for reasons of health, was not employed in the coal industry from October, 1942 to October, 1946, but he returned to coal industry employment January, 1947 and continued to April, 1951. Pavlovscak compiled twenty-four years' service in the thirty-year period preceding application. The court, sustaining Trustees' denial of the pension application, interpreted Resolution 41, paragraph I. C., as follows (p. 208):

This work record totals twenty-four years within the maximum thirty year period immediately prior to plaintiff's application for pension permitted to be used pursuant to Trust Fund regulations in calculating plaintiff's application. If plaintiff had regularly worked in the coal industry in a classified job immediately prior to May 29, 1946, only twenty years work in a classified job in the aforesaid thirty year period immediately preceding plaintiff's application for pension would be necessary to satisfy coal industry service requirements of the Trust Fund regulations.

If plaintiff had not regularly worked in the coal industry in a classified job immediately prior to May 29, 1946, then pursuant to requirements promulgated by the defendant trustees as set out in paragraph 5 (C) hereof, " * * * he shall be eligible for a pension only upon the completion of twenty years service in the Bituminous Coal Industry, and meets the other requirements of eligibility as contained in paragraphs A and B and its subsections, subsequent to May 28, 1946."

It must be kept in mind that the date May 29, 1946, was not an arbitrary date, selected at random by the Trustees without reason or basis. That was the date the first, and predecessor to the instant Fund, the United Mine Workers of America Welfare and Retirement Fund of 1946, was created. In a brief review of the history of the 1950 Fund, the Final Report of the Senate Sub-Committee investigating Welfare and Pension Plans³ stated in part (p. 167):

President John L. Lewis of the UMW had long been convinced of the need for a welfare and pension program for miners. He first put forward a demand for a welfare fund in the 1945 wage negotiations. The operators refused. Mr. Lewis did not press it that year, but in the following year it was the principal demand of the union. All of the union's demands were refused by the operators; no settlement was reached and coal production ceased. After a strike, from April 1 to May 22, 1946, the Government seized the mines under the War Labor Disputes (Smith-Connally) Act. On May 29, Secretary of the Interior Krug and the union entered into what became known as the Krug-Lewis agreement. This agreement, among other matters, provided for a welfare and retirement fund to be financed by 5 cents a ton contribution on coal produced for use or sale.

³ Welfare and Pension Plans Investigation, Final Report submitted to the Committee on Labor and Public Welfare by its Subcommittee on Welfare and Pension Funds pursuant to S. Res. 40, as extended by S. Res. 200 and S. Res. 232 (84th Congress).

This Court is cognizant of the fact that during the period following December 7, 1941, this country was at war and there was not only a demand for workers in the war industries, but also that those who had left their employment for military service had created employment openings in other industries. In many instances these employment openings offered opportunities not available in the coal industry. A coal miner could often increase his income and fringe benefits, and secure less dangerous employment. With the belief this new found opportunity was an avenue for permanent escape from the unrewarding drudgery, danger and hardship of the coal miner's life, many coal miners left the industry. No umbrage is taken if this chance for improvement was seized upon, but the fact remains these miners had terminated their connection with the coal industry.

In some cases, such as Miniard states here, the coal miner left the industry because of bad health, and there are any number of personal reasons which also required coal miners to terminate their connection with the coal industry. But again the inescapable fact remains these men had severed their coal industry connection, and could not be classed as coal industry employees.

After the cessation of hostilities the employment picture changed, war industries closed, servicemen returned seeking their old jobs, and through the efforts of Mr. Lewis for the first time there was some semblance of personal security in the coal industry. Coal miners had hospital and medical coverage during their working years and a pension for their old age. Both those who had their hopes of a new career shattered by the return to normalcy of the employment situation, and those who had retired or ceased work in the coal industry for personal reasons, sought to regain their employee status in the coal industry so as to avail themselves of the new found benefits offered by the Fund.

While certainly no one, especially those closely associated with the coal miner's problems, could fault those who

sought to regain coal industry employment, the Trustees were faced with the necessity of maintaining the financial integrity of the Fund. As the Final Report of the Senate's Welfare and Pension Plans Investigation noted (p. 177): "The pension program is on a pay-as-you-go basis; there is no funding of benefits". The Trustees, within their authority, created eligibility requirements for pensions, as well as other Fund benefits, which by the dictates of their fiduciary obligation were designed to prevent dissipation of the trust res to a point of complete depletion. As a result of their intimate knowledge and expertise of bituminous coal industry problems, the Trustees selected May 29, 1946, the historic date of the creation of the first welfare fund in the coal industry, as the date an applicant must have been in an employee capacity in the coal industry to be eligible for pension benefits.

With reference to the changes in the pension program of the Fund, the Final Report of the Welfare and Pension Plans Investigation conducted by the Senate Sub-Committee observed, without adverse comment or legislative recommendation (p. 177):

The eligibility conditions for pensions have been changed a number of times. An important change was made in 1953. Prior to this time, the essential eligibility conditions were that (1) the miner must be 60 years of age or older; (2) have retired after May 29, 1946; (3) have been employed in the industry in a classified job for a year preceding retirement, and (4) have had 20 years of service in classified jobs in the industry. *In 1953 these conditions were changed to require that the 20 years of service must have been within the 30 years preceding retirement, and that the applicant must have been regularly employed in a classified job immediately prior to May 29, 1946.*

These changes have caused a considerable number of persons to be denied pensions who would otherwise have been eligible under the former requirements. (As indicated above approximately a third of all denials in the 1955 fiscal year were on the ground that

the applicant had not been employed in the industry immediately prior to inception of the fund.) The main reasons for these changes were that the fund was finding that many individuals who had retired or had left the industry prior to May 29, 1946, were obtaining temporary employment as miners only to qualify for pensions, and the mounting costs of the pension program required some tightening up of eligibility conditions. (Emphasis supplied)

Trustees' action, in maintaining the financial integrity of the Fund by establishing the period "immediately preceding May 29, 1946" as the period within which an applicant must have established employee status in the coal industry as an eligibility requirement for pension benefits, was within the authority granted to them as Trustees by the Trust Indenture (J.A. pp. 10-15). This Court in *Kosty v. Lewis*, (C.A. D.C., 1963) 115 U.S. App. D.C. 343, 319 F. 2d 744, recognized that Trustees had this authority when it stated (pp. 748-749):

We do not deny the authority of the Trustees to revise pension eligibility requirements in the light of their experience. Flexibility of this kind seems especially necessary for the operation of this Fund, tied as it is to the fluctuating fortunes of the coal industry.

If the requirement of "regular employment" in the bituminous coal industry "immediately preceding May 29, 1946", adopted by the Trustees as a requirement for pension eligibility, is not within the necessary "flexibility" referred to by this Court in *Kosty*, any determination of an eligibility requirement could be said to be arbitrary and capricious. The eligibility requirements of 60 years of age and 20 years of service could be attacked because the Trustees selected 60 years of age instead of 59, or 20 years of service instead of 19. Obviously, many applicants have been denied because for personal reasons or desires they were forced to leave the coal industry before reaching 60 years of age or completing 20 years of service,

but those facts do not make Trustee adoption of those requirements arbitrary or capricious.

The Trustee adoption and interpretation of Resolution 41's, paragraph I. C., is clearly consonant with the Trustees fiduciary obligation, and as found by the District Court, is not arbitrary, capricious or in bad faith.

ARGUMENT II

APPELLANT MAY NOT FIRST RAISE HERE ISSUES NOT PRESENTED TO, OR CONSIDERED BY, THE DISTRICT COURT, AND CHARGE THE DISTRICT COURT THEN ERRED, BUT EVEN SO THOSE ISSUES ARE WITHOUT MERIT.

Miniard raises in this Court issues not raised in, and therefore not considered by, the District Court.⁴ The District Court cannot be held to have committed reversible error by its order of January 9, 1966 (J.A. p. 28), granting Trustees' motion for summary judgment and denying Miniard's cross-motion for summary judgment, based on contentions first raised here.

The District Court did not write an opinion setting forth its views. The reason is apparent. The pleadings, and the uncontroverted facts, left only one issue, namely, Miniard's sole contention in the District Court that the Trustees, having established eligibility regulations, have no right to deny an individual his pension when he clearly meets the Trustees' established requirements.⁵ By the

⁴ These issues are summarized as follows:

1. Trustees violated their fiduciary duty by failing to formally publish this interpretation of paragraph I. C., Resolution 41.
2. Since the union's duty of fair representation of all employees is superimposed on Trustees, Trustees violated their fiduciary duty by failing to fairly represent the interests of all potential beneficiaries.
3. Trustees violated their fiduciary duty by discriminating between classes of potential beneficiaries, namely those employed in the industry immediately preceding and subsequent to May 29, 1946.

⁵ While dehors the record, this statement of the issues before the District Court is taken directly from Miniard's Points and Authorities (p. 2) filed with the District Court.

District Court's order of judgment, it must be concluded that the Trustees were found not to have been arbitrary or capricious in determining Miniard did not meet the Fund's pension eligibility requirements, and that the District Court correctly decided this question.

That an appellate court will not consider issues not raised in the lower court has become a legal precedent, established and followed uniformly, not requiring extensive citation. This Court recently repeated the rule and the reason in *Stouper v. Jones*, (C.A. D.C., 1960) 109 U.S. App. D.C. 106, 284 F. 2d 240, stating (p. 243):

As this argument was not presented to the District Court, we need not consider it. *American Air Export and Import Co. v. O'Neill*, 1954, 95 U.S. App. D.C. 274, 221 F. 2d 829. This court cannot hold a trial court to be in error in failing to decide an issue not put before it in a civil action. *Brown v. Rudberg*, 1948, 84 U.S. D.C. 221, 171 F. 2d 831.

In the earlier *American Air Export and Import Co. v. O'Neill*, (C.A. D.C., 1954) 95 U.S. App. D.C. 274, 221 F. 2d 829, this Court followed the rule and stated Trustees' position here, that (p. 831):

Since this contention was not urged below, we need not consider it here. *But it is without merit in any event.* (Emphasis supplied)

A. The Allegation Trustees Did Not Formally Publish Interpretation of Paragraph I. C. Has No Record Support, and No Basis in Fact.

Argument I, of Miniard's brief, pages 9 through 14, contains the only argument responsive to the issues in the District Court. But even there, a question not raised in the District Court is put forward. The suggestion is made the Trustees did not formally publish their interpretation of Resolution 41's, paragraph I. C.

Miniard's summary of argument states positively Trustees "have never made the twenty years' subsequent employment requirement" contained in paragraph I. C. "a part of the formal, published eligibility requirements" (Br. p. 7). Yet in Argument I, the statement is not positive, but at best a conjecture (Br. p. 10). There we are informed "To the best of appellant's knowledge the Trustees have never published this interpretation of the proviso". While Trustees were not advised of this dubious contention in the District Court, Trustees stand ready, by documentary proof, to refute it at any time.

Miniard's apparent purpose is to bring himself within the general area of this Court's *Kosty v. Lewis*, (C.A. D.C., 1963) 115 U.S. App. D.C. 343, 319 F. 2d 744, which required Trustees to give notice of a change in eligibility requirements, before the effective date of such change. But here, there was no change in eligibility requirements immediately prior to Miniard's application, and no contention was made he could have met such prior resolution. As indicated without adverse comment in the Final Report of the Senate Sub-Committee investigating Welfare and Pension Plans (p. 177), "In 1953" the pension eligibility requirements "were changed to require * * * regular employment in a classified job immediately prior to May 29, 1946". The additional requirements of paragraph I. C., Resolution 41, are identical to those contained in the prior Resolution adopted in 1953, and Trustees also stand ready to prove, at any time, that both Resolution requirements were identical.

Raising the notice contention at this late date leaves Trustees in the untenable position of defending an issue first raised in this Court, without the opportunity to present record authority to form the factual basis for their defense to this issue. It is eminently unfair to both Trustees and the District Court.

B. Trustees Are Separate and Apart from Both Union and Employers, and Fiduciary Obligations Imposed Upon Trustees Do Not Include the Precise Fair Representation Duties Imposed on Unions by the Act.

Each and every issue raised by Miniard's Argument II, A and B, are improperly raised in this Court. Not one of these issues was raised in, or considered by, the District Court. As heretofore stated, *Stouper v. Jones, supra*, holds this Court "need not consider" these issues, and precludes holding the District Court "to be in error in failing to decide an issue not put before it in a civil action" (p. 243). If, as Miniard's Argument II heading states, the District Court erred in granting Trustees' motion for summary judgment, the District Court did not err in failing to rule on the questions presented in this Court, but not "put before" the District Court by Miniard.

The thesis, interwoven into each contention raised in Argument II, A and B, is the equation of Trustees' fiduciary obligations with the obligations required of a union and an employer by the Labor-Management Relations Act, 1947 [29 USCA 141, et seq.] Miniard urges the United Mine Workers of America, International Union, and the various bituminous coal operators signatory to the collective bargaining agreements, containing the Trust Indenture, have delegated their authority to draft eligibility requirements for Fund benefits to the Trustees. While "Appellant does not question the lawfulness of this delegation of power" (Br. p. 16), it is continually maintained that the Trustees have no authority or obligation beyond the limitations which the Act places on the U.M.W. and the signatory coal operators.

The immediate, patent fallacy of Miniard's thesis, is found in the Acts' requirement that 302 (c) (5) Funds be created as trusts. In a landmark opinion, the Third Circuit, examining the legislative history of Section 302 (c) (5),

said in *United Marine Division v. Essex Transportation Company*, (C.A. 3, 1954) 216 F. 2d 410, 412:

With this background it is not hard to see what the lawmakers were after. They were forbidding money to be paid to representatives of unions unless through a trust fund, the requirements for which were set up in some detail.

* * * These trustees were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. *But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out. (Emphasis supplied)*

The Trustees are thus bound only by the restriction of 302 (c) (5) and other applicable law, including the fiduciary obligations imposed upon any trustee.

Miniard's principal arguments, included in the contention the Trustees in establishing Fund eligibility requirements are bound by the Act's fair representation requirement imposed on a union, are (1) the Trustees are the agents of the appointing union and employers, and (2) the wages earned by the employees are compensation for services performed. Both contentions are without merit, and do not render Trustees' adoption and interpretation of Resolution 41's paragraph I. C., arbitrary, capricious or a violation of their fiduciary obligations.

(1) The agency contention, based solely upon the opinion in *Local 138, International U. of Operating Engineers v. N.L.R.B.*, (C.A. 2, 1963) 321 F. 2d 130, is immediately distinguished and rejected by a brief consideration of the facts.

The court there observed, of the eight member board of trustees of that trust (p. 137):

Four members of the board are appointed by Local 138, three by Nassau-Suffolk, and one by B.T.E.A.; *these organizations have the right to replace their appointees at will.* (Emphasis supplied)

and affirmed that (p. 137):

The Board's finding that the Fund and its trustees were agents of the union and Nassau-Suffolk is supported by the fact that *all of the trustees were officials of and served at the pleasure of their appointing bodies.* (Emphasis supplied)

In the *Local 138* case, the trustees "served at the pleasure of their appointing bodies" but here, the Defendant-Trustees once appointed, serve for the duration of the Contract or as long thereafter as is necessary to properly administer the Trust. The Trust Indenture, contained in the 1950 Contract (J.A. p. 10) provides for the appointment of trustees and their successors as follows:

In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Trust Indenture further provides:

It is agreed by the contracting parties hereto, that *the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.* (Emphasis supplied)

(2) The royalty paid into the Fund by the signatory bituminous coal operators may under certain circumstances

be considered in the nature of additional compensation⁶ to the employees producing the coal, but those employees, potential beneficiaries, have no vested interest in the royalties, the trust res. The Trust Instrument provides (J.A. p. 10):

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement.

In *Lewis v. Benedict Coal Corporation*, (C.A. 6, 1958) 259 F. 2d 346, reversed on other grounds, 361 U.S. 459, 4 L. ed. 2d 442, the court held there the employees did not have a vested interest in the trust res, the royalties paid into the Fund by the signatory operators. The court said (p. 355):

Though *sui generis*, union welfare funds created under the authority of 29 U.S.C.A. § 186(c), are similar in

⁶ While the Supreme Court in *Lewis v. Benedict Coal Corp.*, (1960) 361 US 459, 4 L. ed. 2d 442, held the royalty payments "are really another form of compensation to the employees" the Court cautioned that "This is not to say that the same treatment should necessarily be accorded to royalty payments as is accorded to wages" noting only that the "similarity militates against the inference . . . trustees' claim be subject to offset" (p. 449). In *United States v. Embassy Restaurant*, 359 US 29, 3 L. ed. 2d 601, the Court held royalties due Trustees were not wages "due to workmen" and denied to them the priorities normally ascribed to wages under the Bankruptcy Act. (pp. 604-605).

some respects to charitable trusts. See *Van Horn v. Lewis*, D.C. 1948, 79 F. Supp. 541, 545; Cf. *Hobbs v. Lewis*, D.C. 1958, 159 F. Supp. 282. As in a true charitable trust, the actual beneficiaries of this fund are not ascertainable. *Present employees who are potential beneficiaries may have an "interest" sufficient to enforce compliance with statutory requirements for administration of the fund*, see *Wilkins v. De Koning*, D.C. E.D. N.Y. 1957, 152 F. Supp. 306, *but it is clear that the agreement did not contemplate vesting the employees with a present "interest" in the trust res so as to warrant a set-off in favor of the settlor.* (Emphasis supplied)

The District Court in *Szuch v. Lewis*, (D.C. D.C., 1960) 193 F. Supp. 831, 833, cites with approval the Sixth Circuit's *Benedict* conclusions, *supra*, noting this Court "has not considered the question". The District Court then stated (p. 833):

As in a charitable trust, this trust has a fund set up for the benefit of a specific group of beneficiaries—not all of whom will benefit. The trustees in exercise of their discretion established requirements which raise the individual beneficiary from the unascertained group. The trustees may change these requirements and must interpret them. (Emphasis supplied)

A miner, a potential beneficiary for a number of years, may never become eligible for pension benefits. For any number of reasons he may cease employment in the coal industry before amassing the required twenty years of service. In which event, whether voluntarily or involuntarily, the miner would lose his potential future interest in Fund pension benefits.

C. Neither Reason, Fact Nor Law, Sustain the Charge, Trustees Have Discriminated Among Classes of Potential Beneficiaries.

This Court in *Sturgill v. Lewis*, (C.A. D.C., 1966) ____ U.S. App. D.C. ____, 372 F. 2d 400, held that "Trustees perform their function * * * in an area of social concern and importance" to all miners "whose pension rights may be jeopardized by depletion of the Fund" (p. 401). Miniard's complaint that the Trustees' adoption of May 29, 1946 as a cutoff date, requiring "regular employment immediately preceding" that date, is per se, arbitrary, capricious and discriminatory, must be considered the antithesis of the *Sturgill* pronouncement. To follow Miniard's complaint to its ultimate conclusion, there should be no cutoff date, and all persons even vaguely connected with the coal industry should receive pensions. Patently, the adoption of some date was required by the Trustees to insure the financial integrity of the Fund and to insure the Fund would not be "jeopardized by depletion".

The dictum of this Court in *Danti v. Lewis*, (C.A. D.C., 1962) 114 U.S. App. D.C. 105, 312 F. 2d 345, relied upon by Miniard, states that if the cutoff date of May 29, 1946, was determined because the Fund was established on that date, "the Trustees were arbitrary and capricious in so providing" (footnote 5, pp. 349-350). Though the Trust Indenture gives Trustees full authority in determining eligibility requirements for Fund benefits, recognized by this Court in *Kosty v. Lewis*, supra, the *Danti* dictum would seem to be contra. If there is to be a denial of Trustee authority in this regard, what authority is to make this determination? What date is not "arbitrary and capricious" as applied to some applicant? As to Miniard any date prior to April, 1952, is arbitrary and discriminatory. If March 5, 1950, the date the present trust was created is selected, Miniard would still fail to meet this date.

May 29, 1946, the date of the first of these succeeding Funds, is not, contrary to the *Danti* dictum, an arbitrary selection. It must not be forgotten that the 1950 contract (J.A. p. 10) merges the 1947 and 1950 Funds. The 1950 Fund took over the assets and the beneficiary obligations of the 1947 Fund. We have, therefore, a technical separation and succession, but for practical purposes an uninterrupted continuity. This fact was overlooked by the *Danti* dictum though the record contained the 1950 contract language referred to above.

Again Trustees ask, who is authorized to determine eligibility requirements for Fund benefits in their stead? In *Szuch v. Lewis*, (D.C. D.C., 1960) 193 F. Supp. 831, the court answered this interrogatory in positive language, stating (p. 835):

"Trustees having the power to exercise discretion will not be interfered with so long as they are acting bona fides. To do so would be to substitute the discretion of the court for that of the trustees." *Shelton v. King*, 229 U.S. 90, 33 S. Ct. 686, 687, 57 L. Ed. 1086.

The purpose of the Court's review, then, is to establish that the trust is administered within the terms of the trust agreement and in such a way as to protect the beneficiaries from arbitrary and capricious actions. *Ruth v. Lewis*, supra.

The trustees in this case have complete discretion to establish the eligibility requirements for a pension. They could and in fact have changed these requirements. Upon plaintiff's application for a pension they exercised their discretion to interpret the scope of one of these requirements. Their interpretation of the clause, "employed in the Bituminous Coal Industry," was such that plaintiff's status did not fall within the requirement. There is no evidence they acted in bad faith, arbitrarily or capriciously. The fact that the Court might interpret this term in a broader sense has no bearing, since it is the discretion of the trustees that controls. (Emphasis supplied)

Dissenting in *Danti*, Chief Judge Bazelon reiterated the *Szuch* rationale, saying (p. 352):

As Trustees, we might well have reached a more generous result. But the narrow scope of our review does not permit us to disturb rational determinations concerning the scope and application of regulations drawn by the Trustees pursuant to discretionary powers granted them by the trust instrument.

Judge Bazelon then stated, "The Trustees are at least as well qualified as the courts to decide such questions", and expounded this conclusion in footnote 8 (p. 352):

A reviewing court necessarily views such issues in a vacuum, whereas the Trustees consider them against a background of practical considerations and facts not available to the court. For example, the trust fund is by the terms of the Agreement subject to payments for several specified purposes other than pensions "as agreed upon from time to time by the Trustees". The Trustees must therefore consider the allocation of available monies to the various purposes which they have chosen to promote. If it appears that one purpose is threatening to draw a disproportionate share of the fund, the Trustees may consider interpreting the eligibility requirements narrowly in order to balance the distribution of benefits. In this case, moreover, they may have considered such factors as the number of people in Danti's position and the relative difficulty of establishing when a worker stops seeking work as compared to when he stops working. Our inability to weigh such considerations militates against substituting our own interpretation of eligibility requirements for that of the Trustees. (Emphasis supplied)

CONCLUSION

The record in the District Court permits no other conclusion but that the District Court's order granting Trustees' motion for summary judgment, and denying Miniard's cross-motion for summary judgment, should be affirmed. It is an equally cogent conclusion that issues first

raised in this Court, and not raised in, or considered by, the District Court, should not form the predicate for disturbing the judgment of the District Court or the Trustees.

WELLY K. HOPKINS

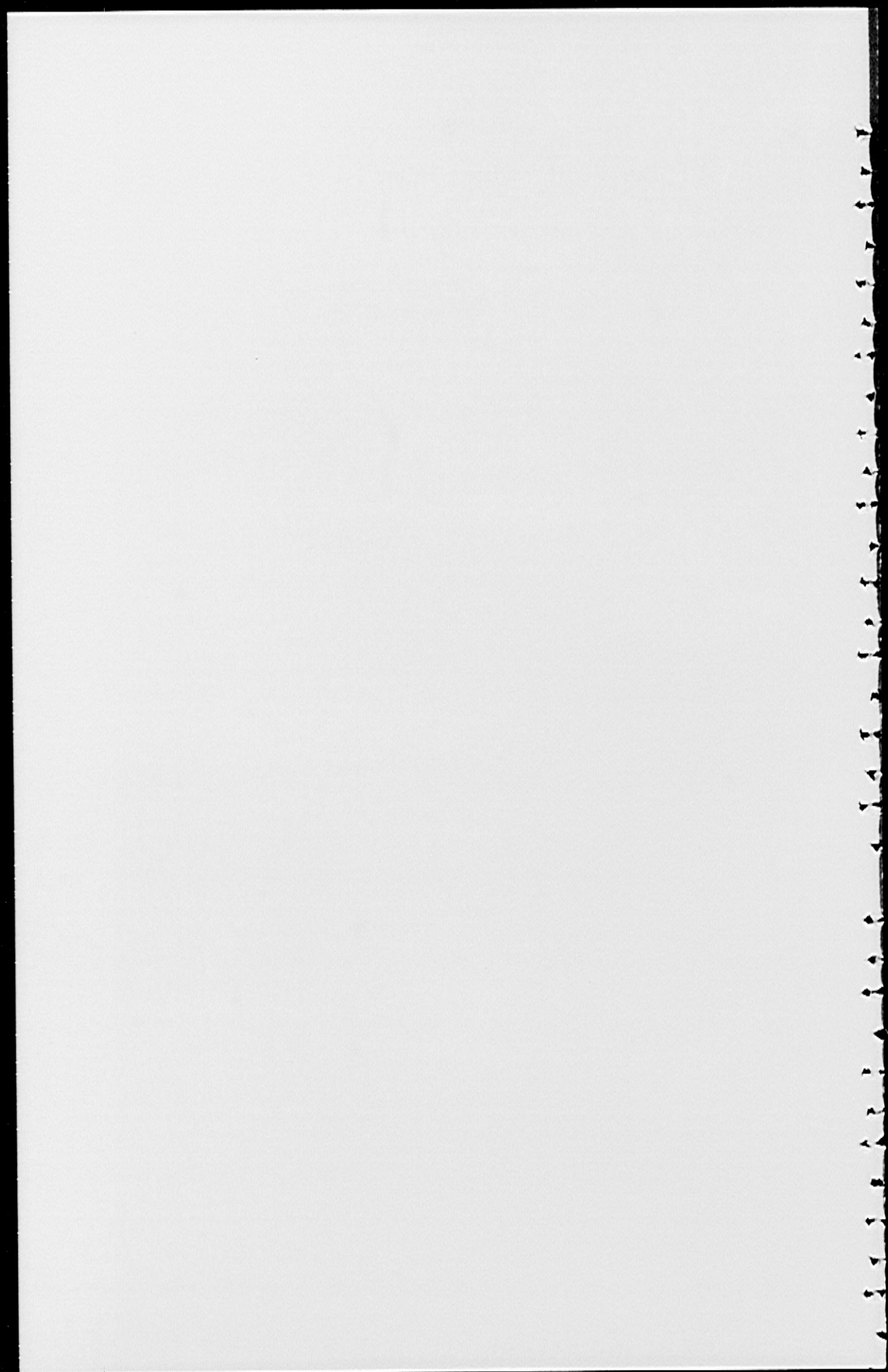
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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. No. 2930-'65

WALTER MINIARD, Harlan, Kentucky, *Plaintiff*,

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, HENRY G. SCHMIDT,
Trustees, United Mine Workers of America, Welfare
and Retirement Fund, *Defendants*.

Complaint for Damages for Breach of Trust and for Injunctive Relief

Plaintiff is a resident of Harlan, Kentucky, Defendants are Trustees of the United Mine Workers of America Welfare and Retirement Fund, located at 907-15th Street, N.W., Washington, D. C., 20005. The amount in controversy is in excess of \$10,000.

1. John L. Lewis, Josephine Roche, and Henry G. Schmidt are the Trustees of the United Mine Workers Welfare and Retirement Fund (hereinafter referred to as the "Fund") which was originally established in 1946. Said Fund is required to be administered for the "sole and exclusive benefit" of employees of the employer-settlor, pursuant to the terms of Section 302(c) (5) of the Taft-Hartley Act, 29 USC § 186(c) (5).

2. Subject to the stated purpose of the Fund and the restrictions of law, Defendants have authority to establish criteria of eligibility of the beneficiaries of the Fund and to grant pension applications.

3. Plaintiff is a retired coal miner, having served as a coal loader for over 20 years prior to his retirement in 1959. Plaintiff was a member of the United Mine Workers during this period.

4. In 1959, at the time of Plaintiff's retirement, the eligibility requirements, established by the Trustees of the Fund, were: The applicant (1) must be 60 years age or over; (2) that he had completed 20 years of service in a classified job in the coal industry within the 30 years immediately preceding the date of his application; (3) that he retired after May 29, 1946 following regular employment in a classified job in the mine of an operator signatory to the agreement; and (4) that he was regularly employed in a classified job in the coal industry immediately prior to the date the first fund was established.

5. On or about August 13, 1959, Plaintiff applied for a pension. Plaintiff met each of the requirements for eligibility and therefore was entitled to receive a pension, yet the Defendants arbitrarily and capriciously denied Plaintiff's application for pension.

6. As a result of the Defendants' failure to grant Plaintiff's application for pension, which was required of the Defendants as part of their duties, Plaintiff has been damaged in the amount of \$50,000.

7. Wherefore, Plaintiff demands judgment against the Defendants, and each of them in the amount of \$50,000. Plaintiff further requests this court to enjoin the Defendants from a breach of their trust and compel the Defendants to perform the obligations of their trust and enroll plaintiff as a beneficiary of the Fund. Plaintiff further requests that he be awarded costs of this proceeding.

By ARMISTEAD W. GILLIAM, JR.
Armistead W. Gilliam, Jr.
Attorney for Plaintiff,

Walter Miniard
Harlan, Kentucky

Landis, Cohen and Singman
1910 Sunderland Place, N. W.
Washington, D. C. 20036
HO 2-6010

Demand for Jury Trial

Plaintiff demands a trial by jury on all issues.

ARMISTEAD W. GILLIAM, JR.,
Armistead W. Gilliam, Jr.,
for Plaintiff

Answer

Come now the Defendant Trustees, by their attorneys, and in response to Plaintiff's complaint, state as follows.

FIRST DEFENSE

Plaintiff's complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

This Honorable Court lacks jurisdiction.

THIRD DEFENSE

Plaintiff alleged cause of action is barred by the Statute of Limitations.

FOURTH DEFENSE

Plaintiff's alleged cause of action is barred by laches.

FIFTH DEFENSE

The Defendant Trustees admit the allegations contained in the initial paragraph of Plaintiff's complaint, except that Defendants are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950.

1. In response to the allegations contained in paragraph numbered one (1) of Plaintiff's complaint, the Defendant Trustees aver that they are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, which Trust Fund was established in 1950, and that

said Trust Fund is administered according to the terms and provisions of the Trust Indenture and other applicable law.

2. The Defendant Trustees, in response to the allegations contained in paragraph numbered two (2) of Plaintiff's complaint, aver that they have full authority with respect to questions of eligibility; that pursuant to the authority contained in the Trust Indenture they have enacted resolutions setting forth requirements of eligibility for pensions; that the Defendant Trustees have granted pensions to those applicants who have met the requirements of eligibility for pensions as contained in the aforesaid resolutions.

3. The Defendant Trustees deny the allegations contained in paragraph numbered three (3) of Plaintiff's complaint, except that they aver that the allegation that Plaintiff was a member of the United Mine Workers of America is immaterial.

4. The Defendant Trustees deny that the allegations contained in paragraph numbered four (4) of Plaintiff's complaint, correctly and fully state all the requirements of eligibility for a pension.

5. The Defendant Trustees deny the allegations contained in paragraph numbered five (5) of Plaintiff's complaint, except they admit that Plaintiff filed an application for a pension bearing date of August 13, 1959, which application was received by the Defendant Trustees on or about August 21, 1959.

6. The Defendant Trustees deny the allegations contained in paragraph numbered six (6) of Plaintiff's complaint.

7. The Defendant Trustees deny the allegations contained in paragraph numbered seven (7) of Plaintiff's complaint.

In further answer to Plaintiff's complaint, the Defendant Trustees deny each and every allegation therein contained not herein otherwise specifically admitted or otherwise answered.

The Defendant Trustees deny that Plaintiff is entitled to a jury trial in this cause.

Wherefore the Defendant Trustees pray, that Plaintiff's complaint be dismissed with prejudice and costs, and judgment in favor of the said Defendant Trustees be entered.

EDWARD L. CAREY
Edward L. Carey

.....
Val J. Mitch

.....
Joseph T. McFadden
*Attorneys for the Defendant
Trustees*

821 Fifteenth Street, N.W.
Washington, D. C., 20005

Motion for Summary Judgment

Comes now the Defendant Trustees, by their attorneys, and move this Honorable Court to grant summary judgment in favor of the Defendant Trustees.

Attached hereto and made a part hereof are the following: Statement of Material Facts as to which there is no Genuine Issue; Exhibit "A", the National Bituminous Coal Wage Agreement of 1950, pertinent portions of which contain the Trust Indenture; Exhibit "B", Resolution 41, being a resolution enacted by the Defendant Trustees, pursuant to the authority contained in the Trust Indenture, which sets forth the requirements of eligibility for a pen-

sion at the time Plaintiff made application for a pension, at the time Plaintiff's application for a pension was received by the Defendant Trustees, and at the time Plaintiff's application for a pension was denied; Exhibit "C", a copy of Plaintiff's application for a pension; Exhibit "D", a statement signed by Plaintiff on September 28, 1959; and Exhibit "E", a certification that Exhibits "A", "B", "C" and "D" are true copies.

The grounds of this motion are:

1. Defendants are Trustees of a Trust created by its settlors, to wit, Coal Operators signatory to the National Bituminous Coal Wage Agreement of 1950, and a labor union, the United Mine Workers of America. The Trust Indenture is set forth in pertinent provisions of the National Bituminous Coal Wage Agreement of 1950 (Exhibit "A").

2. The Trust Indenture specifically gives to the Board of Trustees full authority with respect to questions of coverage and eligibility and all other related matters. Pursuant to this authority, the Trustees have enacted Resolutions setting forth requirements of eligibility for pensions.

3. The pension resolution applicable in the instant cause is Resolution 41 (Exhibit "B").

4. Resolution 41 required, among other things, that an applicant must have, "... (been) regularly employed in a classified job in the Coal Industry immediately preceding May 29, 1946; . . ."

5. Plaintiff, in his pension application, (Exhibit "C"), and in a statement signed by him on September 28, 1959 (Exhibit "D"), admitted that from May, 1943 until February or April, 1952 he was employed outside the Coal Industry as an insurance company salesman.

6. It is obvious that Plaintiff failed to meet the requirement of eligibility for a pension, to wit, that he must have been employed in a classified job in the Coal Industry, immediately preceding May 29, 1946. Plaintiff was not so employed. Therefore, the Trustees could not have been arbitrary or capricious when they denied his application for a pension.

Wherefore, there being no genuine issue of fact, the Defendant Trustees pray that this Honorable Court grant summary judgment in their favor.

E. L. C.

Edward L. Carey

J. McF.

Joseph T. McFadden

*Attorneys for Defendant
Trustees*

821 Fifteenth Street, N.W.
Washington, D. C., 20005

**Statement of Material Facts as to Which There Is No
Genuine Issue**

Come now the Defendant Trustees, by their attorneys, and state the following facts, as to which there is no genuine issue.

1. The United Mine Workers of America Welfare and Retirement Fund of 1950 is a trust, created by its settlors, to wit, Coal Operators signatory to the National Bituminous Coal Wage Agreement of 1950 and a labor union, the United Mine Workers of America.

2. The Trust Indenture is contained in pertinent parts of the National Bituminous Coal Wage Agreement of 1950, copy of which is attached hereto as Exhibit "A".

3. Among the powers granted in the Trust Indenture to the Board of Trustees of this Trust were the following:

Subject to the stated purposes of this Fund, the Trustees shall have full authority within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, *and all other related matters.* (Emphasis supplied).

4. That pursuant to the aforesaid authority contained in the Trust Indenture, the Trustees enacted Resolution 41, on June 10, 1954, which resolution was in effect at the time of plaintiff's application for pension, the date of receipt thereof by the Trustees, and the date of denial of plaintiff's application for a pension. Resolution 41 provides in part:

1. ELIGIBILITY

An applicant shall be eligible for pension if he has:

A. * * * *

B. * * * *

C. Retired from or ceased work in the Bituminous Coal Industry after May 28, 1946, following regular employment in a classified job *and was regularly employed in a classified job in the Coal Industry immediately preceding May 29, 1946;*
* * *

(Emphasis supplied).

(Copy of Resolution 41 is attached hereto as Exhibit "B".)

5. Plaintiff filed an application for a pension dated August 13, 1959, which was received by the Defendant Trustees on August 21, 1959. Plaintiff's application for

a pension was denied on November 3, 1959. Copy of Plaintiff's application for a pension is attached hereto as Exhibit "C".

6. In response to question 13 on plaintiff's application for a pension, plaintiff states that from May, 1944 until April, 1952 he was employed by the Life & Casualty Insurance Company, Nashville, Tennessee as a salesman. Plaintiff's statement as contained in his pension application is corroborated by an additional statement, signed by plaintiff on September 28, 1959, wherein he unequivocally states that he worked for Life Casualty Ins. Co. from the 5th month of 1943 to the 2nd month of 1952. This statement of Plaintiff is attached hereto as Exhibit "D".

7. Unquestionably, plaintiff was not employed in the Coal Industry within the period May, 1943 through February or April, 1952.

.....
Edward L. Carey

.....
Joseph T. McFadden
Attorneys for Defendant
Trustees

821 Fifteenth St. N.W.
Washington, D.C., 20005

NATIONAL BITUMINOUS COAL
WAGE AGREEMENT OF 1950

Effective March 5, 1950, To June 30, 1952
Executed at Washington, D. C., March 5, 1950

* * * * *

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950

A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950." During the life of this Agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30¢) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Operators signatory do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado is appointed as the neutral Trustee. Said three Trustees so named and

designated shall constitute the Board of Trustees to administer the Fund herein created.

In the event of a deadlock on the designation or agreement as to any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302 (c) of the "Labor-Management Relations Act, 1947."

It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the "Labor-Management Relations Act, 1947," and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947," as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the

United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid "Labor-Management Relations Act, 1947." Subject to the stated purposes of this Fund, the trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them be agreed upon.

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and

any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement.

The obligation to make payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement.

It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto. Payments to said Fund shall be made by check payable to "United Mine Workers of America Welfare and Retirement Fund of 1950" and shall be delivered or mailed to the office of said Fund located at 907 Fifteenth Street, N. W., Washington, D. C., or as otherwise designated by the Trustees.

It is stipulated and agreed by the contracting parties hereto that an annual audit of the Fund hereinabove de-

scribed shall be made by competent authorities to be designated by the Trustees of said Fund. A statement of the results of such audit shall be made available for inspection of interested persons at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

Failure of any Operator signatory hereto to make full and prompt payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement. This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Operator during the life of this Agreement and it shall be deemed a violation of this Agreement if any mine to which this Agreement is applicable shall be sold, leased, sub-leased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder.

Action which may be required hereunder by the Operators for the appointment of a successor Trustee representing them, or which may be required in connection with any other matter hereunder, may be taken by those Operators who at the time are parties hereto, and authorization, approval, or ratification of Operators representing fifty-one percent (51%) or more of the coal produced for use or sale during the calendar year previous to that in which the action is taken shall be sufficient and shall bind all Operators.

B. It is hereby stipulated and agreed by the contracting parties with respect to the Fund created by the National Bituminous Coal Wage Agreement of 1947:

(1) The Operators signatory hereto agree to make payments into said Fund on or before March 15, 1950, on account of all coal produced for use or sale up to and including March 6, 1950, with respect to which pay-

ment has not heretofore been made, such payments to be on the basis heretofore made by said Operators under the National Bituminous Coal Wage Agreement of 1947 and the National Bituminous Coal Wage Agreement of 1948 whichever is applicable.

(2) The Operators signatory hereto hereby renounce and forever release any and all claim to or interest in payments made into the said 1947 fund.

(3) The Trustees appointed pursuant to this Agreement are hereby authorized and directed to accept into the new trust fund hereby created and to devote for the purposes hereinabove specified and enumerated, any and all trust funds remaining unexpended or unobligated in said 1947 trust fund.

(4) The parties hereto agree that the best interest of the beneficiaries of said trust fund would be served by having all unexpended or unobligated funds therein transferred as above provided, and agree that the Trustees thereof should transfer such funds to the new trust fund created by this Agreement.

C. It is stipulated, understood and agreed by the contracting parties hereto that the present practices with respect to wage deductions and their use for provision of medical, hospital and related services shall continue during the terms of this contract or until such earlier date or dates as may be agreed upon by the United Mine Workers of America and any Operator signatory hereto.

D. It is the intent and purpose of the contracting parties hereto that full cooperation shall by each of them be given to each other, the Trustees named under this Section and to all affected Mine Workers to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of this Fund.

* * * * *

**Thirty-Second Meeting of the Board of Trustees of the United
Mine Workers of America Welfare & Retirement Fund of
1950, January 27, 1955**

RESOLUTION NO. 41

BE IT RESOLVED, that Paragraphs I and II of Resolution No. 30 as amended by Resolutions No. 31, No. 32 and No. 40 be and they are hereby amended to read as follows:

I. ELIGIBILITY

An applicant shall be eligible for pension if he has:

- A. Attained the age of sixty (60) years or over at the time of his application for pension.
- B. Completed twenty (20) years service in the Coal Industry in the United States, its possessions or territories, or the Dominion of Canada within the thirty (30) years' period immediately preceding his application for pension; * * * .
- C. Retired from or ceased work in the Bituminous Coal Industry after May 28, 1946, following regular employment in a classified job and was regularly employed in a classified job in the Coal Industry immediately preceding May 29, 1946; provided that if he had retired from or ceased working in the Bituminous Coal Industry prior to May 29, 1946, he shall be eligible for a pension only upon the completion of twenty (20) years' service in the Bituminous Coal Industry, and meets the other requirements of eligibility as contained in Paragraphs A and B hereof and its subsections, subsequent to May 28, 1946.
- D. In computing years of service as provided in subsection B hereof, credit shall be given for a maximum of five (5) years self-employment in the Coal Industry before May 28, 1946, and credit for

self-employment in the Coal Industry subsequent to May 28, 1946, shall be given only for those years during which the applicant was a signatory to a National Bituminous Coal Wage Agreement.

II. PROOF OF ELIGIBILITY

The burden of proving eligibility shall be on the applicant. The Trust Fund shall have full and final determination as to the competence of the proof submitted.

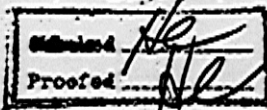
BE IT FURTHER RESOLVED, that Resolution No. 30 as amended by Resolutions No. 31, No. 32 and No. 40 in all other respects remains unchanged and is in full force and effect.

BE IT FURTHER RESOLVED, that this Resolution shall apply to all pension applications not approved for payment on January 27, 1955.



UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND
907 FIFTEENTH STREET, N. W. WASHINGTON 5, D. C.

99690



Application for Pension

By filing this application, no rights accrue to the applicant until the benefit is authorized for payment. The burden of proving eligibility for this benefit is on the applicant.

ALL QUESTIONS MUST BE ANSWERED—FAILURE TO DO SO WILL DELAY PROCESSING

- District No. 19 Local Union No. 6060 Date 8/13/59
- Name (Print) WALTER MINIARD
First Middle Last
- Social Security Number 40-0097756
- Address STAR ROUTE #B-216 HARRAN KY
Street and Number City State
- Date of Birth MARCH 16 1898 Place of Birth PINE MT, KY
Month Day Year
Proof of age must be attached to this application. See attached information sheet for type of proof required.
- Name of Father JAMES MINIARD Place of Birth PINE MT, KY
First Last
- Name of Mother SARAH HEVESLY Place of Birth PINE MT, KY
First (Maiden) Last
- Name of Wife, if living CALLIE MINIARD Age 55
First Middle Last
- Number of Children under 18 years of age NONE
- Have you ceased working in the coal industry? YES If "yes", what date FEB 6-1959
(Yes) (No) Month, Day, Year
and reason for retirement AGE I have worked in the mines 33 years.
- Were you ever connected with the management or operation of any of the coal companies where you have been employed or did you ever have any financial interest in any company?
Yes No
- If "yes", indicate below the name of the company or companies and the period involved.

NAME OF COMPANY

FROM
(month, year)TO
(month, year)

Applicants who wish credit for service in the Armed Forces should attach copy of discharge.

Applicants who were off work due to compensable mine injury or occupational disease should attach copy of workmen's compensation award.

Year	From Mo.	To Mo.	Name of Coal Company	Location of Coal Company		Mine No.	Local Union No.	Type Work
				Town	State			
1926	DEC		HARLAN COLLIERIES	BROOKSIDE	KY		6060	MACH. MAN
1927			"	"	"		"	"
1928			"	"	"		"	"
1929			"	"	"		"	"
1930			"	"	"		"	"
1931			"	"	"		"	"
1932			"	"	"		"	"
1933			"	"	"		"	"
1934			"	"	"		"	"
1935	JUN		MARY HELEN COAL CO.	MARY HELEN	KY		6645	COAL LOADER
1936								
1937	NOV		HARLAN COLLIERIES	BROOKSIDE	KY		6060	MACH. MAN
1938			"	"	"		"	"
1939			"	"	"		"	"
1940			"	"	"		"	"
1941			"	"	"		"	"
1942			"	"	"		"	"
1943			"	"	"		"	"
1944	MAY		LIFE & CASSETY TRS.	WASHVILLE	TENN			SALES MAN
1945			"	"	"			"
1946			"	"	"			"
1947			"	"	"			"
1948			"	"	"			"
1949			"	"	"			"
1950			"	"	"			"
1951			"	"	"			"
1952	APR		BLUE DIAMOND COAL CO.	CINCINNATI	KY		6660	COAL LOADER
1953								
1954	JUL		HARLAN COLLIERIES CO.	BROOKSIDE	KY		6060	MACH. MAN
1955			"	"	"		"	"
1956	MAR		SUNRISE COAL CO.	BLACKWOOD	VA		6354	MACH. MAN
1957			"	"	"		"	"
1958			"	"	"		"	"
1959	FEB		"	"	"		"	"

U.K. SIGNATORY AUG 24 1959

CERTIFICATION BY APPLICANT

Any person, who knowingly and willfully falsifies any records or makes any false representations or statements or withholds any information in order to secure for himself or for any other person a Fund benefit, shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such false statements or omission of such information, the recipient of benefits will be required to reimburse the Fund in the amount received from the Fund.

(If signature is made by mark (X) two witnesses who know the applicant must sign.)

I certify that the statements made by me in this application are true and correct and that I have listed all of my employment in the coal industry during the past 30 years.

(Witness)

(Witness)

Applicant
sign here

Walter Minard
DO NOT print or stamp

CERTIFICATE OF LOCAL UNION

This is to certify that the above applicant is currently a member of Local Union No. 6660 and has been a member of this Local Union since _____
Month _____ Day _____ Year _____

LOCAL UNION SEAL

John Deaton Jr.
Signature of L. U. Officer

8/13/59
Date

Signature of L. U. Officer

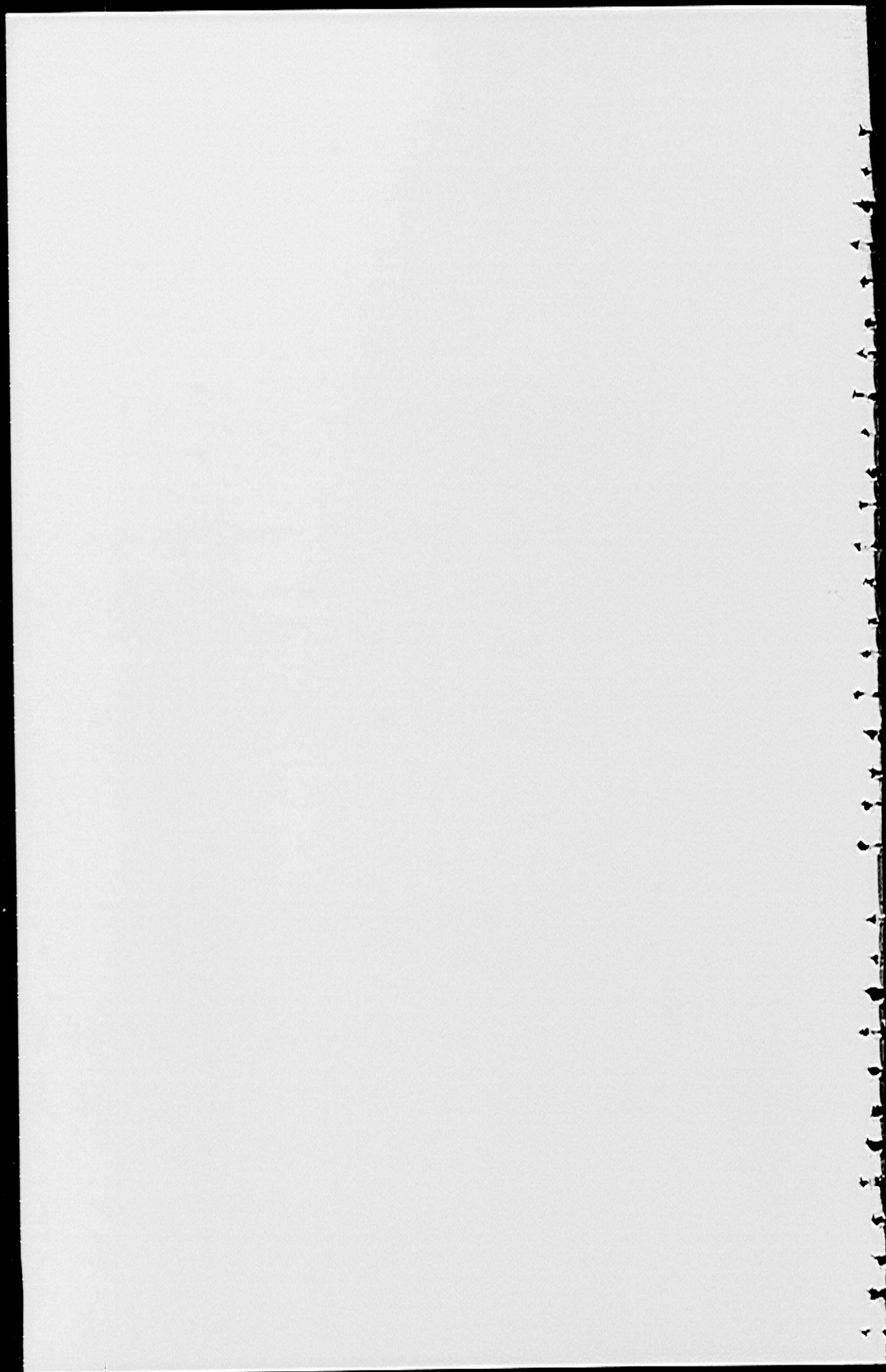
Date

CERTIFICATE OF DISTRICT

This is to certify that applicant is a member of District No. 19, United Mine Workers of America

8/19/59
Date

William J. Purnell
Authorized District Signature



Name Walter Miniard File No. 99690 Date Sept. 28, 1959

Please read this form carefully and answer all questions. When completed, the form is to be returned to the Fund, together with the statements requested. Any additional evidence which you feel might be helpful should also be attached.

(If More Space Is Needed Use Reverse Side)

1. State Below the Reason You Were Not Employed in the Coal Industry From 2nd Qtr. 1943 to 1st Qtr. 1952.

Bad Health

- (a) If your absence from the mines was due to illness or disability, attach statements from the doctors who treated you explaining your physical condition at that time and the nature of treatment you received. If you were hospitalized, attach a statement from the hospital outlining the periods you were hospitalized.
 - (b) Attach a statement from the company where you worked prior to the lapse in employment, outlining the reason you left the coal industry according to company records.
2. Did You Work at Any Other Occupation, Including Farming or Self-Employment of Any Nature, During the Time You Were Not Employed in the Coal Industry?

Yes Yes No—.

If Yes, Give the Following Information:

From Month 5 Year 43

To Month 2 Year 52

Name of Employer Life Casualty Ins. Co.

Type Work Collecting Agt. Debit

(If More Space Is Needed Write on Reverse Side)

Attach a Statement from each company you have listed, outlining the reason their records show your employment terminated.

3. If You Listed No Employment During the Period You Were Not Working in the Mines, Explain Fully How You Provided a Livelihood for Yourself and Family During that Time.

The above information is true and correct.

WALTER MINIARD
(Signature of Applicant)

Interrogatories to Defendants

1. Was an application for pension rights filed with the United Mine Workers of America Welfare and Retirement Fund by Walter Miniard of Harlan, Kentucky? If so, on what date was the application for pension benefits received by the Fund?

2. Was Mr. Miniard's application for pension rights denied?

3. If the pension was denied, state the grounds for the denial in detail.

4. Was the denial based upon any rule or regulation of the Trustees? If so, state what rules or regulations were applied in denying the application.

• • • • •

Answers to Interrogatories

Come now the Defendant Trustees by Joseph A. Reid, Special Assistant to Director, United Mine Workers of America Welfare and Retirement Fund of 1950, and in response to those interrogatories propounded by the plaintiff, and not heretofore objected to, state as follows.

1. Yes, on August 21, 1959.

2. Yes.

3. Plaintiff had not established proof of regular employment in the Coal Industry immediately prior to May 29, 1946. According to evidence in the Trust Fund files Plaintiff was not employed in the coal industry from May 13, 1943 to April 29, 1952 and was, in fact, employed outside the coal industry during this period. Therefore, Plaintiff has not established that he meets the requirements set forth above.

4. Yes, Resolution 30 as amended by Resolutions 31, 32, 40 and 41.

/s/ JOSEPH A. REID

Subscribed and sworn to before me this 11 day of August, 1966.

/s/ SARAH E. CAREY
Notary Public, D.C.

/s/ EDWARD L. CAREY
Edward L. Carey

/s/ JOSEPH T. McFADDEN
Joseph T. McFadden
Attorneys for Defendant Trustees

1317 F Street, N.W.
Washington, D. C., 20004

**Opposition to Defendants' Motion for Summary Judgment
and Cross Motion by Plaintiff for Summary Judgment**

Comes now the Plaintiff, Walter Miniard, by his counsel to oppose the Defendants' Motion for Summary Judgment and ask the Honorable Court to grant Summary Judgment in favor of the Plaintiff on the following grounds:

1. The only ground asserted by Defendants for denying the Plaintiff his pension (see Defendants' answer to Plaintiff's Interrogatory Number 3), and the ground upon which

Defendants' Motion for Summary Judgment is predicated, is the Plaintiff's alleged failure to meet the requirements in Defendant Trustees Resolution 41 (Defendants' Exhibit B to Motion for Summary Judgment) that an applicant for a pension must have been "regularly employed in a classified job in the coal industry immediately preceding May 29, 1946; . . ."

2. Resolution 41 also contains the following caveat to this requirement . . . "provided that if he [the applicant] had retired from or ceased working in the bituminous coal industry prior to May 29, 1946, he shall be eligible for a pension only upon the completion of twenty (20) years' service in the bituminous coal industry, and meets the other requirements of eligibility as contained in paragraphs A and B hereof and its subsections subsequent to May 28, 1946."

3. Plaintiff has completed twenty years' service in the bituminous coal industry and has otherwise met the requirements imposed by the Trustees' Regulations quoted above, subsequent to May 28, 1946. (See Defendants' Exhibit C to Motion for Summary Judgment.)

4. Plaintiff met these requirements on the date the Trustees arbitrarily and capriciously denied his application and has continued to meet these requirements since then.

WHEREFORE, Plaintiff prays this Honorable Court that the Defendants' Motion for Summary Judgment be denied, that Plaintiff's Cross Motion for Summary Judgment be granted, and that an order be entered directing the Defendant Trustees to pay over to the Plaintiff the amount of his pension which has heretofore been withheld from him since Plaintiff's application for a pension was denied on November 3, 1959, and that the Defendant Trustees be further ordered to qualify and pay the Plaintiff the monthly

pension payable to qualified beneficiaries of the Welfare and Retirement Fund.

JULIAN H. SINGMAN
LANDIS, COHEN AND SINGMAN.
Attorneys for the Plaintiff

By: Julian H. Singman
1910 Sunderland Place, N.W.
Washington, D. C,
462-6010

**Statement of Additional Material Facts as to Which
There is No Genuine Issue**

Comes now the Plaintiff, by his attorneys, and states the following additional facts, as to which there is no genuine issue:

1. That the only grounds stated by Defendants for denial of the Plaintiff's pension is his failure to have been regularly employed in a classified job in the coal industry immediately preceding May 29, 1946.

2. That prior to his retirement and application for a pension Plaintiff completed twenty years of service in the bituminous coal industry, a substantial part of which employment was subsequent to May 28, 1946.

3. Plaintiff meets the requirements for eligibility for a pension as provided in paragraphs A and B of Resolution 41 of the Trustees of the Fund.

4. That subparagraph C of paragraph I of Resolution Number 41 of the Trustees of the Fund, set forth in part in paragraph 4 of the Trustees' "Statement of Material Facts of Which There Is No Genuine Issue," reads in full:

"Retired from or ceased work in the bituminous coal industry after May 28, 1946, following regular employment in a classified job in the coal industry immediately preceding May 29, 1946; *provided that if he had re-*

tired from or ceased working in the bituminous coal industry prior to May 29, 1946, he shall be eligible for a pension only upon the completion of twenty years' service in the bituminous coal industry, and meets the other requirements of eligibility as contained in paragraphs A and B hereof and its subsections, subsequent to May 28, 1946." (Emphasis supplied.)

.....
LANDIS, COHEN AND SINGMAN
Attorneys for the Plaintiff

By: Julian H. Singman
1910 Sunderland Place, N. W.
Washington, D. C.
462-6010

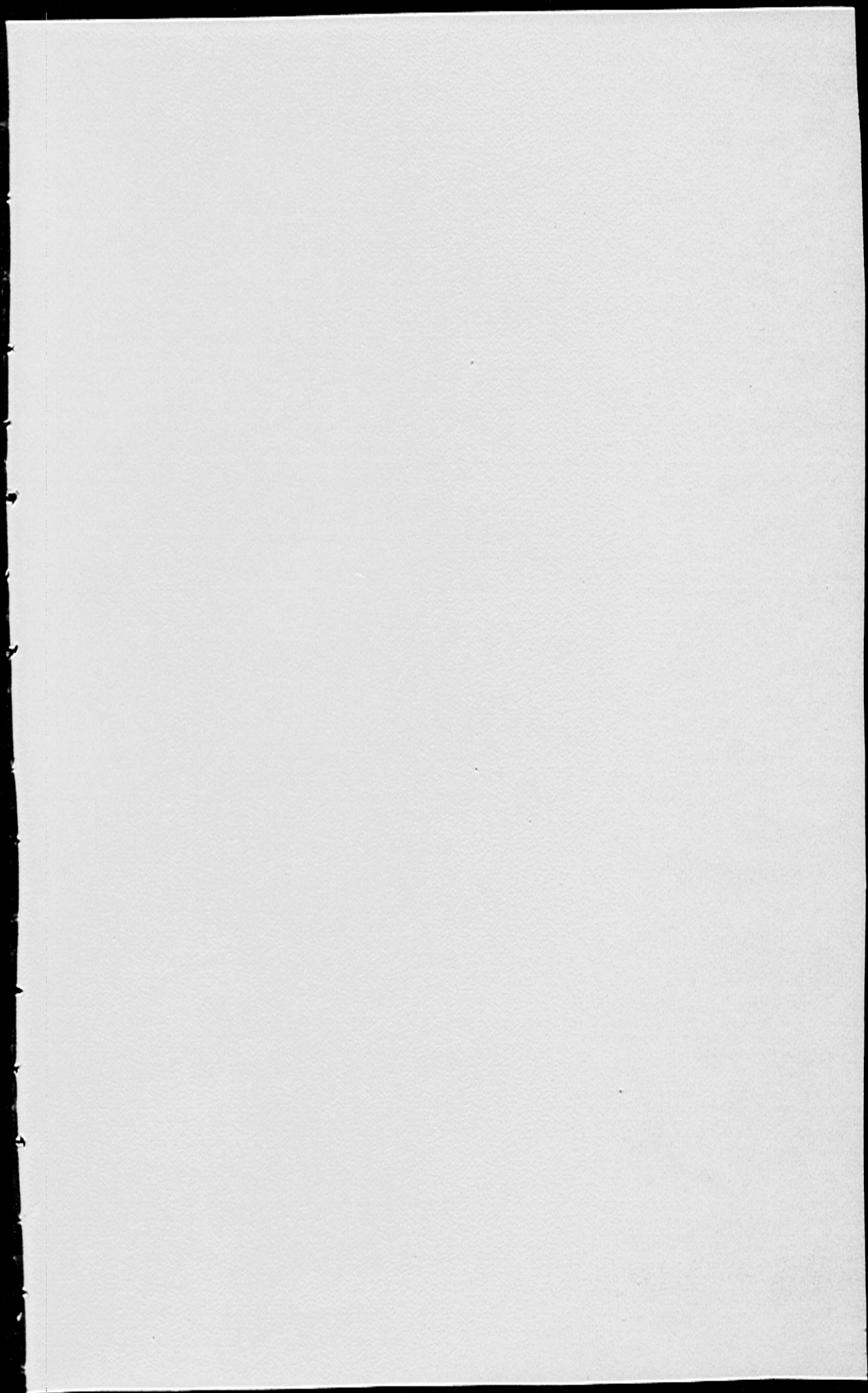
Filed Jan. 9, 1967

Order

Upon consideration of the motion of the Defendant Trustees for summary judgment, the affidavits attached thereto, the interrogatories propounded by Plaintiff and the answers to those interrogatories by Defendant Trustees, the cross-motion by Plaintiff for summary judgment, and upon further consideration of all the pleadings filed in this case, and following argument by counsel for all parties in Open Court, and it appearing to the Court that there is no genuine issue as to any material fact, and that Defendant Trustees are entitled to judgment as a matter of law, it is, by the Court, this 9th day of January, 1967,

ORDERED, That the motion by Defendant Trustees for summary judgment be and the same is hereby granted, and the cross-motion by Plaintiff for summary judgment be and the same is hereby denied.

(S) BURNITA SHELTON MATTHEWS
Judge



REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 20820

WALTER MINIARD,

Appellant,

v.

JOHN L. LEWIS, JOSEPHINE
ROCHE, AND HENRY G. SCHMIDT
Trustees of the United Mine
Workers of America
Welfare and Retirement Fund of 1950,

Appellees.

Appeal From the United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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REPLY BRIEF FOR APPELLANT

- I. THE TRUSTEES, IN ATTEMPTING TO JUSTIFY THEIR INTERPRETATION OF RESOLUTION 41, FAIL TO SHOW HOW PLACING THE LANGUAGE IN DISPUTE IN THE CONTEXT OF THE RESOLUTION, OR OUTSIDE OF IT, JUSTIFIES THE INTERPRETATION THEY SEEK TO PLACE UPON THE LANGUAGE.

The Trustees' Answer to Appellant's interpretation of the "completion -- subsequent to" language of Paragraph I-C of Resolution 41 is that it must be

"interpreted in context." (Brief for Appellees, pp. 7-14). But unless this Court's holding in Danti v. Lewis, 114 U.S. App. D.C. 105, 312 F.2d 345 (1962), is to be completely disregarded, "context" means the context of the Regulation, not a context consisting of the state of the Trustees' minds at the time they adopted the Resolution. The Trustees do not show how placing the language "in context" justifies their interpretation.

The Trustees argue first that context requires their interpretation because otherwise the distinction drawn by the proviso between persons employed on May 28, 1946, and those not so employed would have no meaning whatsoever. This point is answered in Appellant's brief, pp. 11-13, and need not be dwelt upon here. Simply stated, the answer is that there is a statutory requirement for some employment subsequent to May 28, 1946, for those individuals not employed on that date. As interpreted by Appellant, the proviso of Paragraph I-C of Resolution 41 meets this statutory requirement without imposing a prohibitive barrier against individuals not employed on that date.

The remainder of the Trustees' justification of their interpretation constitutes an explanation of the reasonableness of the requirement as they would have it read. (Brief for Appellees, pp. 8-14). This explanation sheds no light on the issue which Appellant raises before this Court; that is, what does the Resolution say? As this Court held in Danti, the question is not

one of what requirements the Trustees could have imposed upon the Appellant when he applied for his pension, but what were the then existing requirements. The Trustees' argument goes to the issue of what the rule could have said, not what it does say.

II. THE TRUSTEES ARE WRONG IN ASSERTING TO THIS COURT THAT THE APPELLANT IS RAISING BEFORE IT ARGUMENTS NOT RAISED BEFORE THE DISTRICT COURT BELOW.

The Trustees at some length in their brief assert that the Appellant attempts to raise in this Court issues not presented for the consideration of the Court below (Brief for Appellees, pp. 14-17). On this ground they attack Appellant's argument that the Trustees' interpretation of the disputed portion of Paragraph I-C of Resolution⁴¹ was "unpublished" and the argument that Resolution 41, as interpreted by the Trustees, violates the duty of the Trustees fairly to protect the interests of all of the potential beneficiaries of the Fund (Brief for Appellees, p. 14, n. 4). As the transcript of the oral argument before the District Judge shows, ^{1/} the Trustees' assertions are patently wrong.

The Trustees first state that Appellant failed to raise with the District Court the fact that the interpretation of Paragraph I-C of Resolution 41 had never been formally published by the Trustees. In fact,

^{1/} The transcript of the oral argument has been filed with this Court by stipulation of counsel as a supplemental record to show the arguments actually presented to the District Court.

Judge Matthews of the District Court specifically asked Appellant's counsel:

"Well now what about the way that they [the Trustees] interpret this provision and have been interpreting it heretofore? Have they not interpreted it in accord with the way that has been presented here this morning by the Defendants?" (Tr., p. 27).^{2/}

In reply Appellant's counsel stated:

"We don't know how they have interpreted it, Your Honor, because the Trustees refuse to publish their interpretation of these Resolutions. They make their interpretations available only on a case-by-case basis as the cases are brought to Court in litigation, Your Honor."

The District Judge and Appellant's counsel continued the discussion of the matter for two or three more paragraphs in the transcript. This issue was clearly presented to the District Court.

The Trustees also contend that Appellant's second major argument, that is, that the Trustees' interpretation of Paragraph I-C of Resolution 41 would be unlawful, was not raised before the Court below.^{3/} Again, the transcript of the oral argument clearly refutes this assertion. The point was first raised by counsel for Appellant when he stated to the Court:

^{2/} All references to transcript (Tr.) are to the supplemental record filed herein.

^{3/} The argument has two parts: (1) the existence of the duty of fair representation, and (2) the Trustees' violation of that duty. The Trustees allege that both elements of the argument were not raised below. As the issue of whether there was an unlawful violation of a duty must assume the existence of the duty, the raising of the violation of the duty necessarily presents both issues before the Court. Thus the two separate parts of the argument will be treated here as one.

"Now Plaintiff argues further, Your Honor, that this is not only the plain meaning of the Resolution, and that any other interpretation of it is arbitrary and capricious, but we argue that the interpretation made this morning by the Trustees is unlawful, and it is unlawful for this reason." (Tr. p. 23).

The discussion of this point consumed the major part of the next thirteen pages of the transcript. A few excerpts should suffice to show that the point was presented to the Court below:

"Mr. Singman: [in distinguishing a case previously cited by Appellees] Nowhere was the contention made [in that case] that the interpretation now being given to this Resolution would be a violation of the statutes of the United States." (Tr. p. 29).

* * * *

"Mr. Singman: [continuing distinction of the same case] ... and there is no aversion to the possibility of their [the Trustees' Resolution] being in violation of the labor laws of the United States if that interpretation is even valid." (Tr. p. 30).

* * * *

"Mr. Singman: I strongly urge the Court, quite apart from the plain meaning of the language, to consider the point that the interpretation of the Resolution now suggested by the Defendants for the first time this morning would be a violation of the labor laws of the United States." (Tr. p. 34).

* * * *

"The Court: Now, I don't follow what you are talking about when you refer to violating the labor laws of the United States.

"Mr. Singman: Well, Your Honor --

"The Court: I know about this statute [Section 302(c)(5)] that was passed and that they do contemplate they could have these pension funds.

"Mr. Singman: They may have a pension fund provided it is a pension fund arrived at pursuant to collective bargaining between employees' representative and employers and the Supreme Court has on many, many occasions held that in collective bargaining agreements that unions must fairly represent all their members, the employees, and not just some of them, and must not discriminate against any of their members in agreements to which they agree." (Tr. pp. 34-35).

Appellant's argument concerning the duty of fair representation and the Trustees' violation of that duty by Paragraph I-C of Resolution 41 was not raised in Appellant's pleadings or written briefs submitted to the District Court. It was not raised prior to oral argument, however, because, on the papers presented before the District Court up until the date of oral argument, Appellant did not know what interpretation the Trustees placed upon the disputed proviso. The Trustees' Motion for Summary Judgment asserted only that Appellant had not been regularly employed in a classified job in the coal industry immediately preceding May 29, 1946 (J.A. p. 6). Neither in the Motion for Summary Judgment nor in the accompanying Statement of Material Facts did the Trustees ever refer to the proviso section of Paragraph I-C of Resolution 41. Thus, at the time Appellant filed his Cross Motion for Summary Judgment, there was nothing in the papers before the Court to show that the Trustees placed an interpretation on the language other than what Appellant considers to be its clear meaning.

At oral argument the Trustees did state their interpretation of this proviso and why it did not, in their opinion, qualify Appellant for a pension.

(Tr. p. 12). Thus, it was only in Appellant's oral argument that he had the opportunity to raise the issue of the unlawfulness of the Trustees' interpretation of the proviso. At that point, it was duly raised and presented to the District Court for its consideration. Counsel for Appellant recognized the difficulty of thoroughly presenting the point on oral argument and on three occasions offered to brief the point for the District Judge. The Judge declined the offer of supplemental briefs (Tr. pp. 33, 34, 38).

On the basis of the above, Appellant can in no way be charged with not having raised for the District Court's consideration below the arguments presented in Part II of Appellant's brief. But even assuming that the issue was not raised before the District Court, this is not a bar to this Court's consideration of the issue. The Court will consider matters not raised below where the interests of justice require. Dart Drug Corp. v. Parke, Davis & Co., 120 U.S. App. D. C. 79, 89, 344 F.2d 173, 183 (D. C. Cir. 1965); Morgan v. Garris, 113 U.S. App. D. C. 222, 307 F.2d 179 (D. C. Cir. 1962); and Mulligan v. Andrews, 93 U.S. App. D. C. 375, 376, 211 F.2d 28, 29 (D. C. Cir. 1954). In this case, as the issue which may not have been raised concerns the lawfulness of the pension requirement under which Appellant was denied his pension, justice clearly requires consideration of the issue.

III. THE TRUSTEES' ARGUMENT THAT THEY ARE "INDEPENDENT TRUSTEES" DOES NOT IN ANY WAY EXEMPT THEM FROM A DUTY TO REPRESENT FAIRLY THE INTERESTS OF ALL OF THE POTENTIAL BENEFICIARIES OF THE FUND.

In their brief, the Trustees deny that they owe to the beneficiaries of the Fund a duty equivalent to a union's duty of fair representation. The basis of this denial is the Trustees' contention that they are "independent Trustees." This answer, however, completely distorts the Appellant's argument, which does not hinge at all upon the independence of the Trustees.

The Fund is an entity created by the Settlers, Management and the Union. The Trustees exercise only those powers which may lawfully be conferred upon them by the Settlers. It goes, almost without saying, that even the most independent of Trustees are restrained in the exercise of their discretion by the limits of the powers which may lawfully be conferred upon them. Cf., Restatement (Second), Trusts §166 (1959). The issue in this case is, what powers may lawfully be conferred upon even the most independent of trustees, and not whether or not these particular trustees are independent. They cannot be independent of the law. As set forth in Appellant's brief, pp. 17-19, there are at least four reasons why the Trustees, assuming they are absolutely independent, nevertheless owe to the beneficiaries of the Fund, when they draft the requirements for eligibility for benefits from the Fund, a duty equal at least to the duty of fair representation owed by a union to its members.

In arguing that they are independent, the Trustees elaborately attempt to show that they are not agents of the Settlers. Appellant does not contend that they are. In only one of Appellant's four points is the word or concept of agency even mentioned. There the concept of agency is mentioned only in the alternative "Whether the Trustees be regarded as agents of the Union and Management, or as Independent Trustees..." (Part Third, Appellant's brief, p. 18). The Trustees' elaborate attempt to distinguish their own position from that of the Trustees in Local 138, Internat'l. U. of Operating Engineers v. N. L. R. B., 321 F.2d 130 (2d Cir., 1963), and to align themselves with the Trustees in United Marine Division v. Essex Transportation Co., 216 F.2d 410 (3d Cir., 1954), is irrelevant to the issues of the case.^{4/}

^{4/} United Marine Division is, of course, entirely distinguishable from the present situation. The issue in United Marine Division, to which the language quoted in the Trustees' brief was directed, was whether the Trustees of a welfare fund created pursuant to subsection (c) of §302 were "representative of employees" so as to come within the provisions of subsections (a) and (b) of the section. The Court held that they were not. This has nothing to do, of course, with the issue in this case; that is, whether when the Trustees themselves, carrying out a function which Congress required the settlers themselves to carry out, can perform the act in a way which would be unlawful if done by the settlers.

IV. IN THEIR BRIEF, THE TRUSTEES ARE IN ERROR IN ASSUMING, WITHOUT OFFERING ANY JUSTIFICATION, THAT THERE IS A NEED, RELEVANT TO THE PURPOSES OF THE FUND, FOR SOME DATE (CUT-OFF DATE) ON WHICH A PERSON MUST HAVE BEEN EMPLOYED IN THE COAL INDUSTRY IN ORDER TO QUALIFY FOR A PENSION.

Two major portions of the Trustees' brief are devoted to support their selection of May 28, 1946, as a "cut-off date." Pages 10 to 14 are devoted to showing that the date has an historical context which requires their interpretation of the disputed language in Paragraph I-C of Resolution 41. Pages 22 to 24 attempt to justify the date in reply to Appellant's charge that the classification of employees based upon that date constitutes an arbitrary discrimination in violation of the Trustees' duty of fair representation.

Both of these attempted justifications are based upon the Trustees' unsupported assumption that there is a need for some date on which a person had to be working for any coal company if he were to receive a pension. The implied assumption is found most clearly in the rhetorical question, "What date is not 'arbitrary and capricious as applied to some applicant?'" (Brief for Appellees, p. 22). The assumption by the Trustees that they need or can pick such a date is erroneous and is, in fact, the principal issue in the case.

Appellant freely admits that, to qualify for a pension, an individual must at some time have worked for an employer contributing to the Fund (or perhaps its predecessors). This employment for a signatory employer

who is contributing to the Fund arises from the requirement in §302(c)(5) that benefits may only be paid to employees of contributory employers. See Blassiev. Kroger, 345 F.2d 58 (8th Cir., 1965). For the purposes of this Fund, this statutory requirements means that an individual must work for a signatory operator on or after March 5, 1950 (the date of creation of this Fund), or perhaps only on or after May 28, 1946, the date of creation of one of the predecessors of this Fund.

The fact that a person must have worked for a signatory employer on or after a given date does not justify any requirement that he must have been an employee of some coal company (the requirement of Resolution 41) or even an employee of a signatory operator on a particular date. The Fund was not created to benefit the employees of coal companies generally or of signatory coal companies employed on any particular date, be it May 28, 1946; March 5, 1950; or any other date which the Trustees might choose. To prefer individuals who were employed on a particular date over individuals not employed on that date is arbitrary discrimination. The Trustees, in their rhetorical question, appear to admit this. This arbitrary conduct can be justified only if there is a reasonable need related to the purposes of the fund for picking such a cut-off date. As there is no need, in carrying out the purposes of the Fund, to have such a date, the Trustees cannot pick such a date -- any date -- without violating their duty not to discriminate unreasonably among the potential beneficiaries of the Fund. Cf., Steele v. Louisville & N. R. R., 323 U.S. 192 (1944).

CONCLUSION

For the foregoing reasons, in addition to those set forth in Appellant's initial brief, this Court should reverse the judgment of the District Court and direct that judgment be entered for the Appellant on his Complaint and the relief requested therein be granted.

Respectfully submitted,

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June 21, 1967

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Petition for Rehearing

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Petition for Rehearing

Appellant, by his attorneys, petitions this Court for a rehearing of his appeal on the ground that the Court has failed to rule upon one of the major issues presented to it, the resolution of which is essential to a decision of the case.

One of the two major issues presented to this Court was whether or not the Trustees (Appellees) in adopting the eligibility requirement under which they denied Appellant his pension, violated their duty to Appellant as a beneficiary of his employer's contributions to the Welfare and Retirement Fund. This issue raised two subordinate questions: First, what is the

duty owed by the Trustees to the beneficiaries of a labor-management welfare and retirement fund? Second, does an eligibility requirement adopted by the Trustees violate such duty if it restricts pension eligibility primarily to those beneficiaries who were employed in the coal industry on a particular day four years before the Fund was created?

Appellant argued that the duty owed by the Trustees is a duty to deal fairly with the interests of all of the beneficiaries of the Fund. This is precisely the standard which is said to be the duty owed the beneficiaries by the Trustees of a Trust having multiple beneficiaries. 2 Scott, Trusts, 1472 (3d ed., 1967); Restatement (Second), Trusts, §183 (1959). (Brief for Appellant, p. 18) It is also the standard owed by a labor union to the individual on whose behalf it bargains, Vaca v. Sipes, 386 U.S. 171 (1967), a relationship which is quite close to the situation of the Trustees vis a vis their beneficiaries, inasmuch as (1) the Trustees, in establishing eligibility requirements, are carrying out a function given by Congress under §302(c)(5) to the labor unions and corporate management; (2) the Trustees are dealing with an element of the wages and conditions of employment of the employees upon whose behalf their union negotiates; and (3) the Trustees exercise their authority under the labor laws of the United States.

Although this was an indispensable issue in this case, the Court touched upon it only in a footnote and then did so without either defining the standard which Fund Trustees must observe or concluding whether or not the eligibility requirement at issue meets such a standard (Note 5, slip

opinion, p. 3). The Court stated merely that the Trustees are not representatives of labor or management and that their duty toward beneficiaries is "fiduciary"; it neither defined by an ascertainable standard what that duty is, nor did it make a determination of whether or not the eligibility requirement in question is a breach of that standard.

Appellant expressly argued that, assuming the Trustees' interpretation of the eligibility requirement is permissible, the requirement violated their duty owed to the beneficiaries. He now urges that he is entitled to a judicial ruling as to the scope of the duty owed to him and as to whether or not the requirement relied upon by the Trustees for denial of his pension meets that requirement. He further submits that, if the Court addresses itself to the latter question, it must conclude that by no normal application of fiduciary standards could the eligibility requirement here at issue be said to be either fair or proper. Indeed, this Court has already suggested in a previous case that the eligibility requirement here at issue is arbitrary and capricious as having been based upon erroneous assumptions. Danti v. Lewis, 114 U.S. App. D.C. 105 at 110, n. 5, 312 F.2d 345 at 349-50, n. 5 (1962).

In establishing the requirements for pension eligibility, the Trustees perform a function that Congress delegated, by statute, jointly to labor organizations and corporate management. The Courts to date have upheld this UMW Trust Agreement under which the Trustees, rather than union and management, write the eligibility requirements because the

Agreement has been held to constitute a lawful delegation by the UMW and signatory operators of their statutory authority. Ramsey v. UMWA Welfare and Retirement Fund, 231 F. Supp. 909 (E.D. Tenn. 1964) and Van Horn v. Lewis, 79 F. Supp. 541 (D.D.C. 1948). In this case, the Court stated only incidentally in a footnote (n. 5) that the Trustees, in exercising that statutory authority, are not subject to the same restrictions Congress placed upon their delegators. Such an important ruling, never before decided by this or any other Court, should not be relegated to a footnote without at least some legal reasoning or authority underpinning it.^{1/}

The Trustees' powers come from the union-management agreement. The union is under a statutory duty, in its collective bargaining, to deal fairly with the interests of all of the individuals on whose behalf it bargains. For the union to give the Trustees the power to deal other than fairly with

^{1/} The Court did cite as lending some support United Marine Division v. Essex Transportation Co., 216 F.2d 410 (3rd Cir. 1954). That case, however, did not deal with this question at all. It merely held that the Trustees were not "representatives" of an employer's employees within the meaning of §302(a) (29 U.S.C. §186(a) (1964 ed.)) which prohibits payments by employers "to any representative of any of his employees." Nowhere was the question discussed of whether or not the trustees of a welfare fund are subject to Congressionally imposed restrictions upon labor and management in administering such funds.

the interests of these employees, in administering large sums of money obtained through collective bargaining, would be a prima facie breach of the union's duty toward these employees. An agreement containing such a power would be unlawful and management cannot adhere to it.

After rejecting in the footnote the notion that the Trustees are subject to the same Congressionally imposed restrictions as are imposed upon their delegators, this Court went on to state that the only limitations upon the Trustees were their duties as fiduciaries. Nowhere did it measure the eligibility requirement against a fiduciary standard. Assuming the existence of a "fiduciary" duty of the Trustees, to which the Court refers, would it not include the duty to deal fairly with the interests of all beneficiaries? See 2 Scott, Trusts, 1472 (3d ed. 1967); and Restatement (Second), Trusts, §183 (1959). If not, then this Court should so state. If so, then this Court should specifically rule on the validity of a provision that excludes from pension eligibility nearly all employees except those who were employed in the coal industry on a particular date four years prior to the time that the Fund was established. Cf. Danti v. Lewis, op. cit. supra.

There are, today, some 11,600 jointly trustee'd welfare funds administered under Labor-Management Agreements.^{2/} The issue of the scope of duty of the trustees of such funds toward their beneficiaries is one of first impression in the Appellate Courts of the United States. If it is

^{2/} U. S. Dept. of Labor, Welfare and Pension Plan Statistics: Characteristics of 163,600 Plans Filed as of July 1, 1965, p. 11, Table 4.

the opinion of this Court that these several thousand trustees may deal as they please with the interests of the several million citizens of the United States who are beneficiaries of these funds, then Appellant respectfully submits that the pronouncement is worthy of more than footnote consideration. If, as Appellant urges, the Trustees are restricted by Congress or by common law principles, then this Court should lay down the perimeters of their discretion.

WHEREFORE, Appellant respectfully asks this Court to grant re-hearing on his appeal on the major issue raised therein, to wit, What is the duty owed by the Appellee-Trustees toward the Appellant as a beneficiary of a labor-management Welfare Fund, and is an eligibility requirement imposed by such Trustees valid when it discriminates among beneficiaries on a basis that is unrelated to the purposes of the Fund or to any of the other conditions upon which wage and benefit discrimination is permissible under Federal Labor Law.

Respectfully submitted,

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January 3, 1968

ATTORNEY'S CERTIFICATE

I certify that the foregoing Petition for Rehearing is filed in good faith and not for purposes of delay, and that a copy has been served this 3rd day of January, 1968, by mail to Harold H. Bacon, Attorney for Appellees, at 907 Fifteenth Street, N.W., Washington, D. C. 20005.

ORLIN L. LIVDAHL, JR.
Counsel for Appellant